THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JULY 2, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

"VIII. That by reason of the premises the plaintiff has been injured in its reputation and credit to its damage of five thousand dollars."

The question is, whether the Supreme Court of New York can reach out its arms like a devil-fish, and draw the whole United States into its embrace. We do not think it can; but the plaintiff in our libel suit is evidently of a different opinion. We shall see.

Our readers must not be alarmed. It is true that we have a hobby now—our libel suit, a matter which doubtless interests us much more than it does them. We expect permission to trot him out once in a while and to stroke his back; but we shall keep him in the stable most of the time. For instance, last week we did not exhibit him at all.

The St. Louis Republican, referring to our libel suit, advises the Supreme Court of the City of New York to hold an occasional term in Missouri for the trial of St. Louis offenders. It might be well for the Criminal Court of the District of Columbia to move to Missouri, also; for that court has been endeavoring for some months to get possession of the person of one of the editors of that journal. Since the decision of Judges Dillon and Treat in *ex parte* Buell (*ante*, p. 312), a new indictment has been found against Mr. Buell by a grand jury of the same court, charging the commission of the alleged offence in the District of Columbia. And so the Republican has a libel prosecution on hand similar to ours, and knows how to sympathise with us, and we with it. And thus "a fellow-feeling makes us wondrous kind," and we hope we may always remain so; for that journal is very good company to be with.

THE SUPREME COURT OF MISSOURI.—The Missouri Constitutional Convention agreed last week that the Supreme Court shall consist of five judges who shall hold their offices for a period of ten years. It will be remembered that the present term is six years. The change is, therefore, a good one. If we can not have a thoroughly independent judiciary—a system under which judges shall hold their offices during good behavior, and be paid an adequate salary,—we ought to be thankful to get something better than we now have.

The Convention agreed upon another wise provision. The Supreme Court is no longer to be on wheels, but is to be held at Jefferson City at such times as may be prescribed by law, and, until otherwise directed by law, on the third Tuesdays of April and October of each year. If the constitution is adopted, the judges need no longer live in a Pullman car, but may take their families to the state capital and remain there in such degree of comfort during the greater part of the year as their meagre salaries will admit of.

CASES IN THIS NUMBER.—Some of our readers who do not practice in the courts of admiralty, may blame us for giving as much space in a single number to a dissenting opinion, as is occupied in this number by the opinion of Mr. Justice Clifford, in the case of the Lotawana. But those who are in a position to profit by such reading will agree with us that our space was never employed to a more useful purpose. It is a comprehensive *resume* of the history of admiralty and maritime jurisdiction in the United States, and its conclusions are enforced by copious citations of authority and by able reasoning.

We shall here take occasion to assure our readers that we do not intend hereafter to publish long cases, unless, like this one, they possess exceptional importance. We beg our correspondents, who contemplate sending us cases for publication, to withhold them, if they are long, unless they can assign some unusual reason why they should be published. If judges could discipline themselves into the habit of writing short opinions, it would be a great boon to the profession. An article in the July number of the Southern Law Review, by Judge Rose, of Little Rock, on "Brevity in the Reports," in which he shows how much superior the judgments of the French courts are to our own in this respect, is worthy of the deepest attention. He utters a simple truth when he declares, that long opinions are *an attack upon the lives of the profession.*

The other case, that of Shirts v. Overjohn, Supreme Court of Missouri, possesses general interest, as well as exceptional importance in Missouri, from the fact that it in effect overrules two previous decisions of the same court, which held that where the signature to a negotiable instrument is obtained by fraud, it may be impeached by the maker in the hands of a *bona fide* holder. The case is upon all fours with Chapman v. Rose (1 CENT. L. J. 242). For its preparation, and especially for the valuable note appended to it, in which all the cases in point are reviewed, we are indebted to M. A. Low, Esq., of Gallatin, Mo.

The History of Lawyers, Ancient and Modern.

That able journal, the Nation, seems to have fallen into the trap which we, thanks to our good luck, did not fall into. Last week it contained a review of a book called "The History of Lawyers, Ancient and Modern," by William Forsyth, and bearing the imprint, "Boston: Estes & Lauriat." This is evidently the same book which we reviewed in our issue of May 7, and for the doing of which we have been summoned to answer an action for libel in the Supreme Court of New York. In other words, it is evidently the old dog "Hortensius" trotted out with a new name engraved on his collar. The character of the imposition which we pointed out in that review is fitly illustrated by the fact, that a journal so acute as the Nation has evidently fallen into the error of supposing this a new book. This will be apparent from the concluding paragraph, which reads as follows, the italics being ours:

Mr. Forsyth has confined his attention in *the present volume* to Greece and Rome, France and England; and his object has rather been to make a popular account of the subject for the laity, than to write a thorough-going history of the bar. In this he has certainly succeeded. For Greece, Rome, England and France he has given a summary outline of the origin and power of

the courts of law and systems of procedure, with abundant references to well known cases as illustrating the condition of the profession at particular times and places. We do not find many things in the book that are new to lawyers; the chapter on the French bar contains more out-of-the-way information than any other.

"The *present* volume" is good. But the reviewer would probably not have considered it good, had he known that this book was written by Mr. Forsyth, and published by John Murray of London, in 1849, under the title of "Hortensius, Duty and Office of an Advocate;" and that it was republished by Mr. Murray under the same title in 1874, and that this book reviewed by him is the first American edition of it. We can not suppose that Messrs. Estes & Lauriat, whom we understand to be reputable publishers, have been intentional parties to this unexplained re-publication of an old book under a new name. Doubtless they have been imposed upon by another house. We know of an instance where a respectable house was imposed upon in a similar way, to which we expect to ask attention hereafter.

The Salaries of Judges.

Two of the judges of the Saint Louis Circuit Court, Hon. George A. Madill and Hon. Chester H. Krum, have recently resigned. The bench lost in Judge Madill one of the ablest *nisi prius* judges which this state has ever had—a man of extensive learning and vigorous intellect, desirous of justice, pure and urbane, who left the bench universally admired and respected by the bar. Judge Krum, who is quite a young man, gave, during his two years of service on the bench, promise of a useful and distinguished career. These judges have resigned for the purpose of entering into a partnership in the practice of the law.

Their resignation suggests the enquiry, What fault exists in our judicial system which prevents us from retaining permanently the services of such men on the bench? The answer must be that the fault lies in that niggardly and distrustful policy which compels our judges to perform an amount of work which is beyond human strength, which pays them a salary out of which a gentleman can not support and educate his family, and which limits their official term to six years, thus obliging them to depend for the continued tenure of their offices upon a mob of politicians in convention, the rank and file of whom frequently consist of the off-scourings of society. An able judge sits on the bench in a position of supposed dignity and elevation, and what does he see beneath him? The leaders of the bar, with less toil and with a less feeling of responsibility, making twice and three times his salary, and maintaining and educating their families in a manner which he can not approach. At the same time he possesses the consciousness that he holds his office by a precarious and degrading tenure which compels him to keep his sails constantly trimmed to catch the popular favor, to be bland to recalcitrant witnesses and jurors; to keep on terms of more or less degrading intimacy with a class of vagrants who have no visible means of support except politics; and, above all, not to render any unpopular decisions on questions which have excited the popular interest. And what does he see before him? The inevitable prospect that, sooner or later, perhaps when he feels old age stealing upon him, when the vigor of his manhood has declined, when the combative spirit has gone to sleep, and when the habit of doubting and looking on both sides of every question has become inveterate—when, in short, he can no longer successfully engage in the active struggles of the bar—he will be turned out, like a broken-down horse to grass,—

> "Weary and old with service, to the mercy
> Of a rude stream that must forever hide him."

How often do we see judges who, after years of honorable service, at a mean and niggardly salary, have been retired because a caucus of politicians refused to renominate them, eking out a precarious subsistance for themselves and families from such driblets as the benevolence of a few old clients or more prosperous practitioners may afford them. It is a shame—a burning shame; and the members of the Missouri Constitutional Convention will have done themselves great discredit, if they adjourn without submitting to the people a proposition for the better pay of our judges.

Let it be placed wholly upon the score of business economy. Let the fact that, as a general rule, the ablest members of the bar can not be induced, at the salaries now offered to judges, to serve on the bench, have its due weight. It is true that there are certain members, comprising either the more indigent or more parsimonious of our population, who insist that second or third rate lawyers, at second or third rate salaries, "jedge" good enough for them. But we believe that it may be affirmed to the credit of our people that this class is a minority, and that, while there is a popular feeling against large salaries in general, the real reason why the salaries of *judicial* officers remain so small is that there are in our legislature too many *young* lawyers and *indifferent* lawyers who want to be judges. This simple fact points to the conclusion that the fixing of judicial salaries should not be wholly remitted to the legislature, but that the Constitutional Convention should, at least, fix a respectable *minimum* below which the legislature may not go. Think of the judges of our supreme court travelling over the state to hold their courts, paying travelling expenses and hotel bills and supporting their families at home, on four thousand five hundred a year, while a London police justice gets six thousand, an English county court judge, ten thousand, and a judge of one of the superior English courts, twenty-five thousand;—think of this, and then deny, if you can, the imputation which has so often been made, of the ingratitude of republics!

The St. Louis Court of Appeals.

If the Bar Association of St. Louis had succeeded, during the first year of its existence, in accomplishing no other object than the adoption by the constitutional convention of a provision for the establishment of a separate Court of Appeals for St. Louis County, it would have justified the pains and expense which have been taken in its organization and maintenance. The docket of the Supreme Court of Missouri for the district which includes St. Louis has become so crowded with cases from the city, that three or four years are said to elapse between the commencement of an ordinary suit and the time when it can be finally heard. To remedy this evil, and to afford some relief to the overworked Judges of our Supreme Court, the St. Louis Bar Association proposed to the constitutional convention, and that body has adopted, a scheme for

the establishment of a separate appellate court of last resort for St. Louis county. The following provision establishing the court and fixing its jurisdiction, was adopted in the convention by the decisive vote of forty-seven to five:

14. There is hereby established in the county of St. Louis, an appellate court, to be known as the "St. Louis Court of Appeals," the jurisdiction of which shall be co-extensive with the county of St. Louis. Said court shall have power to issue writs of *habeas corpus, quo warranto, mandamus, certiorari*, and other original remedial writs, to hear and determine same, and shall have a superintending control over all inferior courts of record in St. Louis county. Appeals shall lie from the decisions of said St. Louis Court of Appeals, to the supreme court, and writs of error may issue from the supreme court, to said court, in the following cases only: In all cases where the amount in dispute, exclusive of costs, exceeds the sum of two thousand five hundred dollars; in cases involving the construction of the constitution of the United States, or of this state; in cases where is drawn in question the validity of a treaty or statute of or authority exercised under the United States; in cases involving the construction of the revenue laws of this state, or the title to any office under this state; in cases involving title to real estate; in cases where a county or other political subdivision of the state, or any state officer is a party; and in all cases of felony.

The following provisions were also agreed to. We print them in full, because our readers may wish to refer to them hereafter:

15. The St. Louis Court of Appeals shall consist of three judges, to be elected by the qualified voters of St. Louis county, who shall hold their offices for the period of twelve years, and until their successors shall be duly qualified. They shall be residents of St. Louis county, shall possess the same qualifications as judges of the supreme court; and shall each receive the same compensation as is now, or may be, provided by law for the judges of the circuit court of St. Louis county, and be paid from the same sources.

16. The judges of said court shall be conservators of the peace throughout the county of St. Louis; any two of said judges shall constitute a quorum; there shall be two terms of said court, to be held each year on the first Mondays of March and October, and the first term of said court shall be held on the first Monday of May, 1876.

17. The opinions of said court shall be in writing, and shall be filed in the cases in which they shall be respectively made, and become parts of their record, and all laws relating to the practice in the supreme court shall apply to this court, so far as the same may be applicable.

18. At the first general election held in St. Louis county in the year 1876, three judges of said court shall be elected, who shall determine by lot, the duration of their several terms of office, which shall be respectively four, eight and twelve years, and certify the result to the secretary of state, and every four years thereafter one judge of said court shall be elected to hold office for the term of twelve years, and the term of office of said judges shall begin on the first Monday in January next ensuing their election. The judge having the oldest license to practice law in the state shall be the presiding judge of said court.

19. Upon the adoption of this constitution, the governor shall appoint three judges for said court, who shall hold their offices until the first Monday of January, eighteen hundred and seventy-nine, and until their successors shall be duly qualified.

20. The clerk of the supreme court at St. Louis, shall be the clerk of the St. Louis court of appeals until the expiration of the term for which he was appointed clerk of the supreme court, and until his successor shall be duly qualified.

21. All cases which may be pending in the supreme court at St. Louis, at the time of the adoption of the constitution, which by the terms of this constitution would come within the final appellate jurisdiction of the St. Louis court of appeals, shall by the supreme court be certified and transferred to the St. Louis court of appeals, to be heard and determined by said court.

22. All cases coming to said court by appeal or writ of error, shall be triable at the expiration of fifteen days from the filing of the transcript in the office of the clerk of the said court.

23. Upon the adoption of this constitution, the office of the clerk of the supreme court at St. Louis and St. Joseph shall be vacated, and said clerks shall transmit to the clerk of the supreme court at Jefferson City all books, records, documents, transcripts and papers belonging to their respective offices, except those required by section 21 of this article to be turned over to the St. Louis Appellate Court, and said records, documents, transcripts, and papers shal become part of the records, documents, transcripts, and papers of said supreme court at Jefferson City, and said court shall hear and determine all the cases thus transferred as other cases.

It will be observed that this measure entails no additional expense upon the people of the state at large; but that it is directly beneficial to them, since it will enable the Judges of the Supreme Court to devote more time to their litigation than they are now able to do. There seems, therefore, no reason to anticipate any general opposition to it.

Bills and Notes — Signature obtained by Fraud — When impeachable in the Hands of Bona Fide Holder.

WILLIAM SHIRTS v. HENRY OVERJOHN.

Supreme Court of Missouri, May Term, 1875.

Hon. DAVID WAGNER,
" WM. B. NAPTON,
" H. M. VORIES,
" T. A. SHERWOOD,
" WARWICK HOUGH, } Judges.

1. **Bills and Notes—Maker's Signature Procured by Fraud — Negligence of Maker—Rights of Bona Fide Holders.**—Where it appears that the party sought to be charged intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing it, but neglecting to avail himself of such means of information, and relying on the representations of another as to the contents of the instrument, signed and delivered a negotiable promissory note, instead of the instrument he intended to sign, he can not be heard to impeach its validity in the hands of a *bona fide* holder.

2. ——. ——. **Presumption—Admission.**— It will be presumed, in the absence of proof to the contrary, that the holder of negotiable paper received it for value, before maturity, and in the regular course of business; but it is error to instruct the jury that such presumptions are admitted facts.

3. ——. ——. **Cases in Judgment.**—O., supposing he was signing a receipt for plows, to be left with him on sale, signed and delivered a negotiable promissory note. The plows were never delivered. Learning afterwards the true character of the instrument, and that the payee was endeavoring to negotiate it, O. caused a notice to be published, warning the public against purchasing the note. Thereupon, E., the payee, complained to O. that he was doing him an injustice, saying that he had sold two of the plows and would endorse a credit of fifty dollars on the note. To this proposition O. assented, and the endorsement was made and O. signed the memorandum. *Held*, (1.) That as a matter of law, the circumstances under which the note was signed constituted no defence to an action on it by a *bona fide* holder; and (2.) that the act of O. in assenting to and signing the endorsement on the note, after acquiring full notice of its true character, amounted to a ratification of the instrument.

Error to the Linn Circuit Court.

HOUGH, J., delivered the opinion of the court.

This was an action instituted by Shirts, before a justice of the peace against the defendant, Overjohn, as maker of a promissory note for $200, dated October 19, 1872, and payable twelve months after date, to the order of T. England. There was a Judgment for the plaintiff before the justice, and defendant appealed to the Linn County Common Pleas Court. At the trial in the common pleas court, the note was read in evidence without objection, together with an endorsement and guarantee in blank by T. England, and also the following endorsement: "Credit fifty dollars on Oct. 28, 1872. H. Overjohn."

The defendant, Overjohn, testified as follows: "At the time I made the note sued on, the payee in said note came to me, and wanted me to act as agent for the sale of his plows. England, the payee, was to let me have three plows, but only left one, which was left as a sample to show to farmers, not to sell. At the time I signed the note sued on, I supposed I was giving a receipt for the plows, I never received the plows he promised to send nor anything else. There was no consideration of any kind for the note, which I thought and understood to be a receipt only."

On cross-examination the defendant said that England wrote the note, and he signed it. He afterwards learned that England was

trying to sell the note, and he published a notice in the Brookfield Gazette, warning the public not to purchase it. The day after the advertisement, England called on him feeling badly about the advertisement, and said that he had sold two of the plows; and that he would give him, defendant, credit on the note for fifty dollars.

England then wrote the credit of fifty dollars on the back of the note and defendant signed it. The editor of the Gazette testified that after a single insertion, the defendant withdrew the advertisement, and according to his best impression, said to him at the time, it was all right.

Plaintiff then offered his own and other testimony to show that he was a *bona fide* holder for value, and before maturity of the note sued on, which testimony was objected to by the defendant, and excluded by the court, and plaintiff excepted.

The plaintiff asked the following instructions:

1. The jury are instructed that it stands admitted that the plaintiff in this suit, purchased said note before it came due, for a valuable consideration, *and without notice of any fraud between defendant and said England.*

2. The jury are instructed that fraud can not be presumed, but that it must be proven, and although the jury may believe from the evidence, that the defendant did not know at the time he signed said note, that it was a note, yet if they believe from the evidence that the defendant placed his name on the back of the note, after he was aware that it was a note, and recognized it as a note, then they will find for the plaintiff.

3. It stands admitted that defendant signed his name on the back of the note in controversy, after he found out that it was a note.

The court refused to give the first instruction as asked, but gave all of it except that portion in italics, and gave the second instruction and refused the third; to which action of the court in refusing to give the third and the latter portion of the first instruction, plaintiff at the time excepted.

At the instance of the defendant, the court gave the following instruction: "That if the jury believe from the evidence, that Overjohn when he signed the note sued on, did not fully understand its character, but thought and understood it to be a receipt for plows, for the sale of which he was to act as agent and to account to England for them, they are bound to find for defendant." To the giving of which instruction plaintiff at the time excepted.

There was a verdict and judgment for the defendant, and plaintiff brings the case here by writ of error.

There were no pleadings in this case, and as there was no testimony of the defendant as to the purchase by plaintiff of the note sued on before maturity for value, and without any notice of any fraud on the part of England, the court committed no error in refusing the first instruction as asked by the plaintiff. The *prima facie* presumption of law, that every holder of any negotiable paper is the owner of it; that he took it for value, before dishonor and in the regular course of business, would not have warranted the court in instructing the jury that such presumptions were admitted facts.

The third instruction asked by plaintiff should have been given. It clearly appears from the testimony of the defendant, that after he ascertained that he had signed a note to England, instead of a receipt, and England proposed to allow a credit of fifty dollars upon it; that such credit was endorsed upon the note, and was accepted and signed by defendant. This testimony of the defendant constituted an admission as fully as if it had been embodied in an answer. The instruction given by the court on behalf of the defendant is seriously objectionable. It directed the jury to find for the defendant, notwithstanding the fact that he freely acquiesced in and ratified the execution of the note, with full knowledge of his mistake and before England had negotiated it; besides it is directly in conflict with the second instruction given for the plaintiff. But another, and as we think, a very grave error, was committed in directing the jury in this instruction, to find for the defendant, if they believe from the evidence that he did not fully understand the character of the instrument signed by him, and thought it to be a receipt and not a note, omitting all reference to the testimony of the defendant himself as to the circumstances under which he signed the note, which was all the testimony there was on that subject, and from which it plainly appears that the mistake of signing a note instead of a receipt, resulted solely from his own negligence and carelessness, without any constraint, artifice or fraud whatever on the part of England. Indeed, on the defendant's own testimony, the plaintiff was entitled to a verdict as a matter of law. The facts testified to by him constituted no defence to the plaintiff's action.

It would be exceedingly difficult to lay down with accuracy a general rule which would be applicable to all cases of this character which might arise; but the result of the best considered cases on this subject may be generally stated to be, that where it appears that the party sought to be charged, intended to bind himself by some obligation in writing, and voluntarily signed his name to what he supposed to be the obligation he intended to execute, having full and unrestricted means of ascertaining for himself the true character of such instrument before signing the same, but by his failure to inform himself of its contents, or by relying upon the representations of another, as to the contents of the instrument presented for his signature, signed and delivered a negotiable note in lieu of the instrument intended to be signed, he can not be heard to impeach its validity in the hands of a *bona fide* holder.

In the case of Foster v. Mackinnon, Law Reports, 4 C. P. 704, decided in 1869, Byles, J., delivering the opinion of the court, affirmed the charge of the chief justice at the assizes, in which he had directed the jury, that if the endorsement of the defendant of the bill of exchange sued on was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if the defendant *was not guilty of any negligence in so signing the paper*, he was not liable as endorser to a *bona fide* holder.

In the case of Whitney v. Snyder, 2 Lansing, 477, decided by the Supreme Court of New York in 1870, the action was against the defendant as maker of a promissory note, the plaintiff being a *bona fide* holder for value, before maturity. The defendant had offered to prove in defence, *that he was unable to read*, and that when he signed the note, it was represented to him, and he believed, that it was a certain other contract, offered to be also produced in evidence and which purported to be a contract *inter partes* of an entirely different character. The testimony was rejected, and the supreme court held that it should have been received, on the authority of the case of Foster v. Mackinnon, approving both branches of the rule, as stated in that case, and say, that it was in its circumstances, quite similar to the case at bar, except that the present is a somewhat stronger case for the defendant *on the question of negligence*. The case of Gibbs v. Linabury, 22 Mich. 479, approves the foregoing cases.

In the case of Chapman v. Rose, 56 N. Y. 137, decided by the court of appeals in 1874,* it appears that the defendant entered into a contract with one Miller to act as agent for the sale of a patent hay-fork and pulley. A contract was filled out by Miller, and signed by both; also an order which was signed by the defendant for one of the hay-forks and two pulleys, for which, by the order, defendant agreed to pay nine dollars. These were delivered to the defendant. Another paper was then presented to the defendant for his signature, which Miller represented to be but a duplicate of the order. Defendant, without reading or examining it, signed and delivered it to Miller; the paper so signed was a promissory

*S. C., 1 CENT. L. J., 242.

note for $270, and was the note in suit. The plaintiff purchased in good faith before maturity. The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action; and that, even if it was delivered, and the plaintiff neglected to make proper enquiry as to its origin, he was not a *bona fide* holder, and could not recover. Johnson, J., in delivering the opinion of the whole court, says: "There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with whom he was deal ing, instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith for value. The question which arises on the branch of the charge now under consideration is, whether it is enough, as against a *bona fide* holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that enquiry, the attention of the judge, at the trial, was distinctly called; and the instruction which he gave, and which was excepted to, did not submit, but excluded the consideration of it from the jury. It is quite plain that if the law is, that no such enquiry is admissible, a serious blow will have fallen upon the negotiability of paper. It will be a premium offered to negligence. To insure irresponsibility, only the utmost carelessness, coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it, that it created no obligation. To avoid such evils it is necessary at least to hold firmly to the doctrine that he who, by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person, shall answer the loss." The cases of Foster v. Mackinnon, and Whitney v. Snyder, *supra*, and Putnam v. Sullivan, 4 Mass. 45, and Douglass v. Matting, 29 Iowa, 498, decided in 1870, are cited in support of the foregoing observations; and the charge of the judge presiding at the trial, was accordingly held to be erroneous, In the reasoning of that opinion and the conclusion reached, we entirely concur.

In the cases of Briggs v. Ewart, 51 Mo. 245, and Martin v. Smylee, 55 Mo. 577, which were similar to the case at bar, the instructions which were brought under review, and which received the approval of this court, declared the law to be, that a person signing a promissory note could not be held liable as maker, by a *bona fide* holder, if his signature was obtained *without his fault or negligence*, on the fraudulent representations of the payee that the paper offered for signature was not a note, and that the party sought to be charged, did not know it was a note and did not intend to sign a note. Some observations, however, of the judge who delivered the opinion of the court in the case of Briggs v. Ewart seem to reject the qualification of negligence, and to announce the broad doctrine, that to be binding, the instrument must be executed as, and for the paper it purports to be, and if the party to be charged did not intend to make a promissory note, he can not be held bound even in favor of a *bona fide* holder for value. These observations and the subsequent case of Corby v. Weddle, 57 Mo. 452, in so far as it is based upon them, are disapproved.

We consider the rejection of the testimony offered by the defendant, an immaterial matter, as we do not think the defence made devolved upon the plaintiff the duty of showing by positive testimony that he was a *bona fide* holder for value before maturity.

The judgment will be reversed and the cause remanded.

All the Judges concur except Judge Vories, who concurs in the result.

JUDGMENT REVERSED.

NOTE.—The foregoing opinion will, we think, meet with the unqualified approval of the bar of this state. They did not accept as final the three preceeding cases on the same subject. The conviction was strong that these cases would not stand the test of a careful consideration, and that when the court should give them a critical examination they would be so modified as to conform to the rule adopted in the other states and in England. We think the rule as stated in the principal case is recognized as the correct one on the subject by all the courts of last resort in the United States that have passed on it. But while the rule is uniform, the application of it gives rise to an apparent conflict of authority.

One reason for the want of uniformity in the application of the rule arises probably from the fact that the leading cases in this country were decided about the same time, and without reference to each other; and it is not a little singular that all the cases on the subject under consideration have been decided within the last seven years. The integrity of commercial paper seems to be subject to periodical attacks from unlooked-for sources, very much as the crops are every now and then threatened with destruction from some newly developed insect or parasite. The timely decision in the principal case, nips in the bud—or, more strictly speaking, in the blossom—one impending peril.

As the authorities are not numerous, a hasty review of them may not be uninstructive.

Foster v. Mackinnon, L. R., 4 C. P. 704, is the leading case under this head in point of time, having been decided in July, 1869; but Douglass v. Matting, 29 Iowa, 498, and Taylor v. Atchison, 54 Ill. 196, were decided in June, 1870, and apparently without any knowledge of the English decision. The next case was that of Whitney v. Snyder, 2 Lans. 447, decided in September of the same year, on the authority of Foster v. Mackinnon, and it seems without notice of the Iowa and Illinois decisions. Gibbs v. Linabury, 22 Mich. 479, was decided in April, 1871, upon the authority of Foster v. Mackinnon and Whitney v. Snyder, without reference to Douglas v. Matting, or Taylor v. Atchison; and the same may be said of Walker v. Egbert, 29 Wis. 194, decided in June, 1871.

In our opinion Douglas v. Matting deserves to rank first as a leading case on this subject, on account of its clear and compact statement of the rule and the reasons upon which it is founded. In that case it was held that one who is induced to sign and deliver a promissory note through the false and fraudulent representations of the payee, in whom he had no right to place special confidence, believing it to be a contract in relation to services, is liable thereon to a *bona fide* holder who takes it before maturity; and it was further held, as a matter of law, that it was gross negligence for a party dealing with a stranger to sign an instrument creating some obligation, without reading it, or attempting to ascertain its true contents And this seems to be the only safe rule. Any relaxation of the rule would impair the value of commercial paper; and would add greatly to the convenience of "a little friendly fraud," to the manifest injury of innocent parties who have been guilty of no want of care or caution. It is certainly more just that he who recklessly and carelessly signs his name to an instrument, the true character of which is unknown to him, should suffer the loss consequent thereto, if any, rather than an innocent purchaser, for value, who takes it in the regular course of business. There would be no safety in purchasing commercial paper if it was required that the purchaser should first ascertain, at his peril, the degree of care exercised by the maker in its execution.

Taylor v. Atchison, *supra*, is entitled to very little weight. The case was poorly considered; no authorities are referred to, and, in fact, it is difficult to determine just what the court did hold. The defendant was induced to sign the note by the fraudulent representations of the payee that it was a contract. Two papers of about the same size and appearance were signed. One of these papers was used by the payee of the note, at the request of the maker who could read, but not very well. A third party, in no way connected with the transaction, was present when the note was signed, and was a witness for the defendant on the trial. It does not appear that he was unable to read, or that he was requested to read the instruments signed. The court conceded that at common law the defendant would have been liable, but placed its decision on the ground that a local statute of that state authorized the defence. It then added: "It is, however, necessary that a person executing such an instrument, which is procured by fraud or circumvention, should use reasonable and ordinary precaution to avoid imposition, when the suit is by an endorsee before maturity. If able to read readily, he should examine the instrument, *or procure it to be read by some one in whom he can place confidence*. If he is unable to read readily, or does so with difficulty, then he may avail himself of the usual means of information by having it read by some person present. He can not act recklessly, and disregard all the usual precautions, to learn the contents of the instrument, and then interpose the defence against an assignee. The court then held, as a matter of law, that the defendant used ordinary precaution. And the court further held that the endorsee of the note was guilty of negligence in purchasing it of a stranger

without first making enquiries of the maker as to its validity. In other words, it was negligent for one to buy a note from a stranger, although he knew the signature to be genuine, but not negligent for a party to sign a paper creating some kind of an obligation, trusting in the representations of the same stranger as to its contents. But it was immaterial whether the endorser was negligent or not; for no mere negligence on his part would have been sufficient to deprive him of the character of *bona fide* holder. There must be actual proof of bad faith to do this. Chapman v. Rose, 56 N. Y. 137,* and cases there cited.

The facts upon which Gibbs v. Linabury, *supra*, was decided, were very similar to those in the Iowa and Illinois cases, above referred to, except that in the Michigan case the maker of the note actually read one contract; but he signed another instrument which proved to be a promissory note, relying on the representations of the other contracting party who was a stranger, that it was like that which he had read. The court then held, on the authority of Foster v. Mckinnon and Whitney v. Snyder, that it ought to have been submitted to the jury whether the defendant was guilty of negligence—in signing the note under the circumstances. We do not see what fact there was to submit upon the evidence. The defendant was either chargeable with "laches, negligence or misplaced confidence in others, which last,"—as was said in Foster v. Mckinnon,—"is but a species of negligence." To place confidence, as defendant said he did, in a stranger, under such circumstances, was gross negligence. Putnam v. Sullivan, 4 Mass. 45; Nebeker v. Cochran, Fountain Circuit Court, Ind., 7 Chicago Legal News, 318; Nebeker v. Cutsinger, Supreme Court of Indiana, not yet reported. Chapman v. Rose, *supra;* Douglas v. Matting, *supra;* Walker v. Egbert, 29 Wis. 194, note, where Dixon, C. J, said: "The case of Douglas v. Matting, 29 Iowa, 498, which at first sight seems to be in conflict, is in reality, not so; since, upon the facts stated in the answer, or assumed by the court, the alleged maker of the note was guilty of 'culpable carelessness' and 'gross negligence' in having affixed his signature to the instrument." Such was also the ground of decision in Garrard v. Haddan, 67 Pa. St. 82 [5 Am. R. 412]. And it should be borne in mind that Foster v. Mckinnon, a very strong case in favor of the defendant, was reversed because the evidence was not sufficient to sustain the verdict.

Some of the cases make a distinction in favor of the maker of a note whose signature is obtained under such circumstances, when he is unable to read, but we do not see any good reason for such distinction. One who can not read is more liable to be selected as the victim of straggling sharpers; and he ought, before becoming a party to a written obligation, and especially with a stranger, to have its contents examined by some person in whom he may reasonably place confidence; and even then, if his confidence should be misplaced, he ought to suffer for the wrongful act of his agent, rather than to be allowed to shift the burden to the shoulders of a *bona fide* holder.

M. A. L.

*S. C., 1 CENT. L. J. 242.

Maritime Law—Lien for Supplies in Home Port—Dissenting Opinion of Mr. Justice Clifford.

THE LOTAWANA.

Supreme Court of the United States, No. 33.—October Term, 1874.

[Concluded from last week.]

Appeal from the Circuit Court of the United States for the District of Louisiana.

Mr. Justice CLIFFORD dissenting.

Controversy, sometimes of an embittered character, existed in the courts of the parent country respecting the jurisdiction of the admiralty court for a century before the American colonies separated from that country and proclaimed their indpendence. Differences of opinion also have existed here as to the proper extent of that jurisdiction ever since the adoption of the federal constitution, as evidenced by the decisions of the supreme court at different periods in our judicial history.

Attempt was made at an early period to limit the jurisdiction of the admiralty courts to tide-waters and to exclude its exercise altogether from waters within the body of a county, whether the waters were or were not affected by the ebb and flow of the tide. Express decision to the effect that the admiralty had no jurisdiction, even in a suit for seamen's wages, was made in the case of The Jefferson, 10 Wheat. 428, except in cases where the service is substantially performed upon the sea or upon waters within the ebb and flow of the tide.

Jurisdiction of the admiralty courts at that period in the parent country, did not extend to any case where the common law courts could give the parties a remedy in a trial by jury, and the theory here for a long time was that the clause of the ninth section of the judiciary act which saves to suitors the right to a common law remedy, where the common law is competent to give it, excluded all cases from the jurisdiction of the admiralty courts if the cause of action arose or accrued *infra corpus comitatus*. Protracted acquiescence in that theory gave it for a time the force of law, until the question was presented directly to the supreme court, when the whole theory was completely overturned in all cases where the cause of action, whether tort or contract, had respect to acts done or services performed upon tide-waters. Waring v. Clark, 5 How. 452.

Doubts of a perlexing character arose in some of the circuits, whether affreightment contracts were cognizable in the admiralty, which ultimately culminated in an absolute denial of the jurisdiction in all such cases. Wide differences of opinion upon the subject existed, and in order to its final settlement the question was presented to the supreme court in its whole length and breadth. The Lexington, 6 How. 392.

Nothing was left undone in that case, on either side, which could be accomplished by a skillful argument and indefatigable research. Two of the propositions, one selected from each side, will serve to illustrate the nature of the contention and the wide range of the discussion. By the appellants it was insisted that the district courts had no jurisdiction over such a contract, because it was made on land, within the body of a county, for the transportation of goods in a described route over inland waters land-locked the whole way, and because the contemplated voyage terminated *infra fauces terræ*. Opposed to that the appellees contended that in all cases of contract the question is whether the contract or service to be performed is in its nature maritime, and that in all cases of maritime contract, the proceeding may be *in rem* or *in personam*, at the option of the libellant. Elaborate discussion followed, but the supreme court silenced forever all well-founded doubts upon that subject.

Such jurisdiction, however, was, in the united view of the supreme court at that time, limited to tide waters; nor did either of the learned justices who delivered the opinions of the court in those cases even intimate that the court could entertain appellate jurisdiction in such a case, if the cause of action consisted of acts done, or service performed on waters not affected by the ebb and flow of the tide.

Admiralty jurisdiction, by virtue of those decisions, continued in our jurisprudence to be limited to the ebb and flow of the tide for more than a quarter of a century, in spite of the deep-seated dissatisfaction which existed in all parts of the country interested in western commerce or in the navigation of the great lakes and rivers of that portion of the Union.

Subsequent attempt was made by Congress to furnish a remedy for the difficulty, which was by no means satisfactory, and expedients to obviate the embarrassment were also attempted by the courts, all of which were equally unsuccessful, until the supreme court was brought face to face with the question whether the rule of decision that the jurisdiction of the admiralty was limited to the ebb and flow of the tide could be upheld as a correct exposition of that clause of the constitution which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

Opposition to change induced the cry of *stare decisis*, just as when the argument was presented, that the admiralty jurisdiction followed the tide even within the body of a county. Such a cry

proved to be insufficient to restrain the advance of admiralty jurisdiction or to prevent it from entering even into the acknowledged limits of states having tide-waters within their borders, and it was again destined to a still greater defeat when it was invoked as the means of perpetuating the great error that the admiralty jurisdiction did not extend to the great lakes and fresh water rivers of our country.

Public duty required the court to review the former case, and the great magistrate presiding over the court did not hesitate to reverse the rule of decision there established, and to determine to the effect that the admiralty jurisdiction is not limited to tide-waters, and that it extended to all public lakes and rivers used for the purpose of commerce and navigation between the states or for foreign trade. The Genesee Chief, 12 How. 454.

Strenuous effort was subsequently made to induce the court to qualify the rule there laid down, or to restrict its application so that the jurisdiction of the admiralty courts should not extend to acts done or service performed within the body of a county, if the waters were above the flux and reflux of the tide, but this court refused to adopt any such qualification, and reaffirmed, in the most authoritative manner, the rule previously announced in the two leading cases upon those subjects. The Magnolia, 20 How. 298; Waring v. Clark, 5 Id. 452; The Genesee Chief, 12 Id. 454.

Unquestionably, the jurisdiction of the admiralty is, by those cases made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide; and the court say, in the case last cited, if the water is navigable it is deemed to be public, and if public it is regarded as within the legitimate scope of the admiralty jurisdiction of the constitution.

Except for one or two expressions contained in the opinion o the chief justice, which are much intensified in the head-note of the case, and which are repeated in the opinion in the case of The Magnolia, those two decisions would, in all probability, have settled the general question of admiralty jurisdiction under the constitution, free from several perplexing embarrassments, which presented themselves in subsequent litigations. Considerable weight is given in those opinions to the circumstance that the great lakes and fresh-water rivers are the theatre of extended commerce between different states and with foreign nations, and this court subsequently fell into the error that the admiralty jurisdiction of the district courts was limited by the commercial power of the constitution, and decided in two cases that an affreightment contract for the transportation of goods from one port in a state to another port in the same state, or that a contract for necessary repairs and supplies furnished to a vessel in such a trade, is not within the admiralty jurisdiction of the federal courts. Allen v. Newbury, 21 How. 245; Maguire v. Card, 21 Id. 250.

Such an error was too palpable not to attract the attention of the court as soon as a case was presented involving the same question, and two or three years later, such a question was presented in the form of a libel for a collision, and the court unanimously decided that the admiralty jurisdiction was conferred by the constitution; that in cases of tort the question is wholly unaffected by the consideration that the ship was not engaged in foreign commerce, or in commerce between the states; that the jurisdiction, whether the cause of action is contract or tort, does not depend on the regulations of commerce; that the two matters of jurisdiction are entirely distinct things, and that they were conferred by separate and distinct grants; that locality is the test of jurisdiction in cases of tort, and that consequently, if the wrongful act is done on navigable waters, the case is one properly cognizable in the admiralty courts. The Commerce, 1 Black, 578.

Attention was again called to those two cases in an affreightment suit, when they were both distinctly overruled without hesitation, and the whole court decided that contracts, claims, or service purely maritime and touching rights and duties appertaining to commerce and navigation, are of admiralty cognizance and properly cognizable in the district courts. The Belfast, 7 Wall. 637

Pending these difficulties, and before the supreme court decided that the judiciary act extended the admiralty jurisdiction over all our navigable waters, the restriction that it did not extend to voyages from a port in one state to another port in the same state, had become incorporated into the act of Congress, passed professedly to extend such jurisdiction to the great lakes and rivers, connected with the same; but the supreme court, in view of the constant and perplexing embarrassment growing out of that restriction, did not hesitate to decide that the act of Congress in that regard had become obsolete and inoperative, and that the admiralty jurisdiction created by the constitution, and conferred by the judiciary act was the same everywhere within the United States, and that every distinction between tide-waters and other navigable waters, was in that regard obliterated and overruled. The Eagle, 8 Wall. 20.

Erroneous theories also became prevalent in certain quarters, in respect to the true nature of the liability of the owners of ships and vessels for necessary repairs and supplies, furnished to the master on the credit of the ship, that the burden of proof was in all cases upon the merchant to show both that the ship needed such necessaries, and that the master was justified in resorting to the credit of the vessel. Decrees to that effect were rendered in the circuit courts, but on appeal to this court the error was corrected, and the true rule applied in the case. The Lulu, 10 Wall. 197; The Grapeshot, 9 Wall. 129.

Where it appears that the repairs and supplies are *necessary* to enable the ship to proceed on her voyage, the presumption is, if they are furnished in good faith, that the ship as well as the master and owner is responsible to those who supplied such necessaries, unless it appears that the master had funds which he ought to have applied to those objects, and that the furnishers knew or ought to have known those facts. The Kalorama, 10 Wall. 203; The Custer, 10 Id. 215.

Sufficient has been remarked to show that the several decisions referred to had the effect to remove every stumbling-block in the way of the full legitimate exercise of admiralty jurisdiction, except two—the one arising from the long acquiescence of the legal profession in the opinion, that the admiralty courts could not take cognizance of suits founded upon marine policies of insurance, and the other growing out of an early decision of this court, which it is supposed prohibits the admiralty courts from taking jurisdiction of a libel *in rem* filed by a material man to enforce a contract for necessary repairs and supplies furnished to a ship in her home port.

Happily, the first of the two obstructions mentioned is removed by a more recent decision of this court, and it is much to be regretted that the majority of this court have decided not to remove the other, until they "have" a more "convenient season" to accomplish that great purpose. Ins. Co. v. Dunham, 11 Wall. 21.

Promptitude in correcting such an error when it is discovered, is very desirable, as the longer it is suffered to prevail the greater is the danger that the correction will impair vested rights. Justice is slow but sure, and it is not doubted that sooner or later the correction will come, as the rule of decision which prohibits the exercise of jurisdiction in such a case is manifestly founded in mistake.

Enough of the facts of the case appear in the opinion of the court without reproducing, to much extent, the details of the evidence. Suffice it to say, that the controversy has respect to the balance of a fund in the registry of the district court, derived from the sale of a steamer seized and sold for the payment of seamen's wages. Both parties in this court were intervenors in the district court. Appellants claim what remains of the proceeds of the sale as mortgagees by virtue of a mortgage of the steamer executed to them by the owner. On the other hand, the appellees make claim

to the same by virtue of the lien, which they insist they have for repairs and necessary supplies furnished to the master on the credit of the vessel. Proofs were taken and the parties heard, and the district court ultimately determined that the mortgagees were entitled to the balance of the fund. Due appeal was taken by the intervenors who furnished the repairs and supplies, to the circuit court, where the parties where again heard, and the circuit court reversed the decree of the district court, and entered a decree in favor of the intervenors who furnished the repairs and supplies. Prompt appeal was taken by the intervening mortgagees to this court from that decree.

Two errors are assigned, in substance and effect as follows: (1) That the circuit court erred in giving effect to the new twelfth admiralty rule, which had not been adopted when the libels of intervention were filed. (2) That the circuit court erred in awarding the fund to the material men, as it is not shown that such creditors have any privilege by the laws of the state.

Contracts or claims for service or damage purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty. Whenever a maritime lien arises in such a contract or claim, as in controversies respecting repairs made, or supplies furnished to a ship, or in case of collision, the libellant may pursue his remedy, whether it be for a breach of a maritime contract or for a marine tort, by a suit *in rem* against the vessel, or by a suit *in personam* against the master and owner in cases where they are jointly liable for the alleged default. By the civil law a lien upon the ship is given, without any express contract, to those who repair the vessel or furnish her with necessary supplies, whether the vessel was at her *home port* or abroad, when the repairs and supplies were made and furnished Williams and Bruce Prac. 154; The John, 3 Rob. Adm. 288; Hormer v. Bell., 7 Moore P. C. 284; 3 Kent Com. 12th ed. 168; 3 Id. 169, note a.

Every man, says Abbott, who had repaired or fitted out a ship or lent money to be employed in those services, had by the law of Rome, and still possesses in those nations which have adopted the civil law as the basis of their jurisprudence, a privilege or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract, or agreement subjecting the ship to such a claim. Abbt. on Ship. 142. "*Qui in navem exstruendam vel instruendam credidit vel etiam emendam privilegium habet.*" Digest, L. XLII. Tit. 5, b. 26. "*Quod quis navis fabricandæ vel emendæ vel armendæ, vel instruendæ causa, vel quoquo modo crediderit vel ob navem venditam petat, habet privilegium post fiscum.*" Id. L. XLII. Tit. 5, b. 34; Code du Commerce, Art. 197; French Code, Liv. 1, Tit. 12, Art. 3; The Harrison, 2 Abbt. U. S. R. 74; Ex-parte Kirkland, 12 Am. L. Reg. N. S. 301; The Nestor, 1 Sumn. 79. Wherever a maritime lien exists, it gives a claim upon the ship, a *jus ad rem*, to be carried into effect by legal process, and the claim travels with the ship into whosesoever possession she may come, and is enforced in the court of admiralty by a proceeding *in rem*. Addison on Con. (6th ed) 273; 1 Wynn's Life Leoline Jenkins, LXXVI, to XCIX.

Beyond all doubt such is the rule of the civil law; but the only lien recognized by the common law in such cases, independent of statutory regulations, is the possessory lien which arises out of, and is dependent upon, the possession of the ship, as in cases where goods are delivered to an artisan or tradesman to be manufactured or repaired. Such a lien, as understood at common law, did not attach unless the ship was in the possession of the person who set up the claim, and the extent of the privilege which it conferred, was that he might retain the ship in his possession until he was paid the money due him for the repairs made or the supplies furnished.

Undisputed matters need not be discussed; consequently it may be assumed that a contract for necessary repairs or supplies is a maritime contract, whether the vessel was at home or abroad when the repairs and supplies were made and furnished; and it may also be assumed that neither a contract for building a ship, nor to furnish the materials for the construction of the same is a maritime contract, because such contracts are not directly connected with maritime commerce. They are contracts made on land, and are to be performed on land. Contractors of the kind collect their materials very largely from the forests and the mines, and until the ship is launched there is no necessary connection between the subject-matter of the contract and her subsequent employment as a vehicle of commerce and navigation. The Jefferson, 20 How. 400; Roach v. Chapman, 22 How. 29; Morewood v. Enequist, 23 Id. 494; Young v. Ship Orpheus, 2 Cliff. 36; Edwards v. Elliott, 20 Wall.

Repairs and supplies were furnished by the intervening appellees to the steamer in her home port, and they claim that they have a lien upon the balance of the fund in the registry of the court for the payment of their demand, which is resisted by the appellants chiefly upon two grounds: (1) They deny that any maritime lien arises in such a case. (2) Because, as they contend, they, the appellants, have a superior claim to what remains of the fund by virtue of a mortgage of the steamer executed to them by the owner.

Support to the first proposition is chiefly drawn from a decision of this court, which, it is supposed, establishes that rule of decision. The General Smith, 4 Wheat. 443.

Claims of the kind, the court admit, in that case, give rise to a maritime lien where the repairs or supplies are furnished to a foreign ship, or to a ship in a port of a state to which the ship does not belong, and that the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and that he may well maintain a suit *in rem* in the admiralty to enforce his right. All the authorities, ancient and modern, admit that proposition, but the court proceed to say that, in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state, and that no lien is implied *unless it is recognized by that law.*

Taken as a whole the opinion in that case is more unsatisfactory than any one ever given in a commercial case by that learned judge. It is unaccountable, says a distinguished jurist, that Judge Story, in delivering the opinion of the court on a question so interesting and pregnant, should have done so little. He gives but one page to the entire opinion, cites no authorities. and treats the subject in a slight and unsatisfactory manner. 7 Am. Law Review, 2.

Other judges have attempted to give the reason for the distinction set up in that case between the remedy given to a party who furnishes necessary repairs and supplies to a ship in the port of a state or other than that to which she belongs, and the remedy given to the party who furnishes like necessaries to a domestic ship. Those reasons are frankly stated by the late Chief Justice Taney in endeavoring to vindicate the action of the court in denying the process *in rem* to a party who had furnished such necessaries to a domestic ship in a state where the state law made such claims a lien upon the vessel. His view is, that the supreme court, being invested with the power to make rules, may in its discretion grant or withhold the right to use the process *in rem* as may seem best suited to promote the ends of justice in such controversies; that the process *in rem* is granted to the party furnishing necessaries to a foreign ship or a ship in the port of a state to which she does not belong, because "the supplies," in such a case, "are presumed to be furnished on the credit of the vessel," and that the process *in rem* is denied to the party who furnishes such necessaries to the domestic ship because it is presumed that they were "furnished on the personal credit of the owner or master." The St. Lawrence, 1 Black, 527.

Sometimes it is said that the process is granted in the former

case because the presumption is that the owner is absent, and tha it is denied in the latter case because the presumption is that the owner is present, which is but another mode of stating the same rule of decision. Unless the credit is given to the ship, the true rule is that there is no maritime lien in either case, and if the credit is given to the ship, reason and sound policy dictate that the party furnishing the necessary repairs and supplies to the domestic ship, should be allowed to proceed against the ship as well as the party who afforded similar relief to the foreign ship, or to the ship of a state to which she did not belong.

Examples almost without number may be given to illustrate the impolicy, injustice, and absurdity of a rule of decision founded on such a distinction. Suppose a vessel, whose home port is York, Maine, all of whose owners except one reside in Portsmouth, N. H., nine miles distant. Well manned and equipped the vessel starts on a voyage for St. Johns, but meeting with rough weather and receiving damage she puts into Eastport, four hundred miles distant from her home port, for repairs and supplies. Material men there, under the supposed rule of decision, would have no maritime lien upon the ship, and the master being unknown there and without credit the necessary repairs and supplies could not be procured, although the presumption of law is that the owners in such a case are present, because the port of Eastport is in the state to which the ship belongs. Unable to find relief there for the want of credit, the ship being only crippled and not entirely disabled, may possibly be able to return, and suppose the master decides to make the attempt, and that the ship arrives in safety off the port of Portsmouth, and puts in there for the relief she vainly sought in her first port of refuge, it may now be assumed that she will meet with no difficulty at that port in obtaining credit, as the material men there will have a lien upon the ship, because the legal presumption is that the owners are absent, though they all reside there except one, whose residence is only nine miles distant.

Apply these suggestions to the different localities of navigation and it will be easy to see that such rules of decision must lead to unparalleled mischiefs and perplexities. Commerce requires more sensible rules of decision, and those whose interests are embarked in such perilous pursuits are entitled to better protection than such rules of decision afford. Executory contracts for repairs and supplies to a domestic ship, it is admitted, are as much within the jurisdiction of the admiralty court as one for similar necessaries furnished to a foreign ship or to the ship of a state other than that to which the ship belongs, but the argument of the opinion under consideration, is that the party in the case of the domestic ship must seek his remedy against the person and not against the vessel. What Judge Story's reasons were for his conclusion does not appear, as he gave none, but it is safe to conclude, in the absence of such, that the best which exist are those given by the organ of the court in the case last cited. The St. Lawrence, 1 Black, 529.

He expressly conceded that the contract was a maritime contract, and placed the vindication of the prior decision upon the ground that the process *in rem* given for repairs and supplies to a domestic vessel by the court of admiralty, in those countries where the principles of the civil law prevail, is no part of the general maritime code, and he insists that it is obvious that the court in the prior case based the decision upon the ground that the laws of those countries are local laws. Here, then, all interested in the question may see the fatal error pervading those decisions, which is that the rule of decision embodied in the several maritime codes are mere local laws, each of the particular country where the code was framed and ordained.

Unless the principles embodied in the ordinances, treatises, sea laws, digests and codes adopted by the countries were the civil law prevails, constitute, to the extent that they concur in the rule of decision, the general maritime code as known in judicial investigation, it is difficult even to imagine what does, as it is known to every legal reader of the judicial history that those countries never convened, as in a congress of nations, and ordained a system of maritime regulations which can properly be regarded as the standard authority upon that subject.

Such a maritime code as that referred to, in that opinion, does not exist; and if not, and all codes of the respective countries which adopt the civil law are to be regarded as mere local laws, the inquiry arises, from what source came the rule of decision, that the district courts as courts of admiralty have jurisdiction over contracts for repairs and supplies furnished to a foreign ship or to the ship of a state to which the ship does not belong, or over contracts of affreightment. Certainly the rule of decision was not derived from the jurisprudence of the parent country as administered at the period of the revolution, as the prohibition of the common law courts had, long before the event, compelled the admiralty to relinquish all claim to the exercise of such jurisdiction.

Support to such a claim of jurisdiction could not be drawn from that source, and if not, and the civil law codes are to be regarded as mere local laws, it is impossible to see, if the views of the appellants are correct, that the admiralty has no jurisdiction over contracts for repairs and supplies to domestic ships, from what source the rule of decision was derived that the words "all cases of admiralty and maritime jurisdiction" include jurisdiction over contracts for repairs and supplies, even to a foreign ship or to the ship of a state to which the ship does not belong, as no such jurisdiction was exercised by the admiralty court of the parent country at the time of the separation.

Two suggestions may be made in response to that argument:

1. That the words of the constitution may refer to the admiralty jurisdiction of the parent country before it had been narrowed by the unfriendly prohibitions of the common-law courts.

Admit that, but then it follows, beyond peradventure, that the same rule of decision which construes the words of the constitution conferring admiralty power as including jurisdiction over contracts for repairs and supplies to foreign ships, must lead to the same conclusion in respect to contracts and supplies furnished to domestic ships, as the ancient jurisdiction of the admiralty courts of the parent country extended to such contracts, whether the repairs and supplies were furnished to foreign or domestic ships. By the civil law every one who repaired or supplied a ship had a privilege or lien upon the ship herself for the amount of the debt thus contracted, and for centuries the admiralty courts of that country exercised such jurisdiction, in respect to which the best text writers say that the lien or privilege extended to all ships and vessels, without any distinction between foreign and domestic ships. The Nestor, 1 Sum. 79; 2 Pars. on Con., 6th ed. 260.

Indeed it is not easy to see, says Benedict, how any difference can exist in principle; if one is a ship or vessel, so is the other; if one is a maritime contract, so must be the other; and the same law, and the same reason which give the rule in the one case, give it in the other. In both it is for service, labor, materials, and supplies furnished, which, when used for the purpose, become a part of the vessel, and a lien attaches to her because the repairs and supplies were for her benefit, which is just as true of a domestic ship as of a foreign ship. Benedict (2d ed.), sec. 270; 2 Pars. on Ship. 322.

By the civil law and the general maritime law, says Parsons, the lien, or privilege extends to all ships, without any distinction between foreign and domestic vessels; and he asserts that the admiralty courts of the parent country exercised that jurisdiction until they were compelled to abandon it by the prohibition, of the common law courts; for which there is the highest authority.

Furnishers of repairs and supplies, says Lord Stowell, in most of the countries governed by the civil law, have a lien on the ship itself, and in our country the same doctrine had for a long time been held by the maritime courts, but after a long contest it was finally overthrown by the courts of common law, and by the highest judicatory of the country. The Zodiac, 1 Hagg. Adm. 325;

Rich v. Coe, 2 Cowper, 639; Farmer v. Davies, 1 Term, 109.

Argument to show that a contract to furnish repairs and supplies, whether to a domestic or foreign ship, is a maritime contract, is hardly necessary, as there is not a well considered decision to the contrary in our language, and the twelfth admiralty rule, throughout all its mutations, from the time it was first adopted to the present time, has always given the district courts jurisdiction over such contracts either *in rem* or *in personam*. Both the enemies and the friends of the admiralty have always concurred in that proposition, which leaves nothing in controversy in this case except the question whether a maritime lien arises where the contract is to furnish repairs and supplies for a domestic ship, as it must be conceded that wherever there is a maritime lien it may be enforced in the admiralty.

Maritime liens differ from common law liens in important particulars, as common law liens are always connected with the possession of the thing, and are lost when the possession is relinquished. On the other hand a maritime lien does not in any manner depend upon the possession, as it is a right affecting the thing itself, which gives a proprietary interest in it and a right to proceed against it to recover that interest. Jurisdiction exists in the admiralty in all such cases, and the rule is that wherever there is a maritime lien upon the property, it adheres to the proceeds in case of sale and follows the same into whose hands soever they may go, and the proceeds under such circumstances may be attached in the admiralty. Jurists and civil law writers frequently call it a privilege, and it is well settled that the proceeding *in rem* in the admiralty is the only proper process to enforce such an interest.

Usually a maritime lien is the proper foundation of a proceeding *in rem*, as such process is seldom or never appropriate for any purpose except to enforce the inchoate interest created by such a lien, and the law appears to be well settled that where a proceeding *in rem* is the proper pleading, there a maritime lien exists in the thing which it is the office of such a process or pleading to perfect. Harmer v. Bell, 7 Moore, P. C. 284; The Rock Island Bridge, 6 Wall. 215.

Successful contradiction of the proposition that the party furnishing repairs and supplies to a domestic ship, as well as he who furnished such repairs and supplies to a foreign ship, had a lien upon the ship by the ancient admiralty law of the parent country, can not be made, as the judicial history of that country is full of evidence to establish the affirmative of the proposition in its full length and breadth. The Neptune, 3 Hagg. 142; 2 Life Jenkins, 746; 1 Pars. Mar. Law, 490; Hoar v. Clement, 2 Show. 328; Justin v. Ballam, 1 Salk. 34; Watkinson v. Bernardiston, 2 P. Wms. 367; Wilkins v. Carmichael, 1 Doug. 106; *Ex parte* Shank, 1 Atk. 234; 1 Pars. on Ship. 322.

Admitted or not, the proposition is established, and it would seem to follow that if it was that practice which led the supreme court to the conclusion that the words "all cases of admiralty and maritime jurisdiction" must include contracts for repairs and supplies furnished to foreign ships, that the same practice should induce the court to hold that the same words also include repairs and supplies furnished to domestic ships, inasmuch as that ruling will correspond as well with the civil law and the general maritime law, as with the ancient practice of the admiralty court of the parent country.

2. All agree that the framers of the constitution, when they employed the words "all cases of admiralty and maritime jurisdiction," must have had in view some system of maritime jurisprudence, and those who deny that the reference was to the general maritime regulations of the commercial world, usually insist, either that the reference was to the English system as known at the date of the revolution, or to the system and practice known in the states prior to the adoption of the federal constitution.

Much discussion at this day to refute the theory that it was the crippled and servile system of the parent country, as it existed at the dawn of our independence, is quite unnecessary, as the reports of the decisions of the supreme court are interpersed throughout with cases in which that theory is denied and overruled. None, it is believed, will now deny that the better source of reference in expounding that part of the constitution, in order to ascertain the extent and boundaries of the admiralty jurisdiction, is to the system and practice in that regard of the admiralty courts during colonial times and before the federal constitution was ratified.

Still the same conclusion must follow as if the question was tested by the system and practice of the admiralty courts of the parent country, as it existed before the essential features of that system were annulled and overthrown by the prohibitions of the common law, for the reason that the history of that period shows to a demonstration that the admiralty courts, organized in the colonies prior to the revolution, claimed and exercised such jurisdiction over contracts for repairs and supplies furnished to domestic ships, as well as over contracts to furnish such necessaries to foriegn ships.

Matters of admiralty cognizance were in most cases reserved to the crown, in the colonial charters, but the first charter granted to the colony of Massachusetts Bay contained no such reservation. Consequently jurisdiction of such matters was exercised in that colony under that charter by a court of assistants, organized by the colony, whose powers and functions were prescribed and regulated by a colonial ordinance, the last article of which ordained that: "All cases of admiralty shall be heard and determined by the court of assistants without a jury, unless the court shall see cause to the contrary, provided always, that this act shall not be interpretated to obstruct the just plea of any mariner or merchant, impleading any person in any other court upon any matter or cause that depends upon contract, covenant, or other matter of common equity in maritime affairs." Ancient Charters, App. p. 716.

Without any explanation it is apparent from the words of the ordinance, that it vests in the court thereby created, full jurisdiction over all maritime cases of contract, covenant, or other matters of equity, reserving to the suitor the right to choose a common law remedy in cases where the common law is competent to give it. Eighteen years later the charter was granted to the province of Massachusetts Bay, and by that charter all such jurisdiction, power, and authority were reserved to the crown, to be exercised by virtue of commissions issued under the great seal. Commissions of the kind issued to the judges of the provincial admiralty courts, have been published, and they prove that those courts were vested with jurisdiction over all maritime causes and cases in the most unqualified terms. Benedict, Admr., 2d ed, sec. 151; Stokes Colonial Hist. 166; Waring v. Clark, 5 How. 454; Ins. Co. v. Dunham, 11 Wall. 10.

Two volumes of the proceedings of those courts in colonial times have recently been found among the papers of a registrar of the court and deposited in a public library in the city of Boston, which are full of instruction on the subject. Libels for contribution, are there found both *in rem* and *in personam*, and libels on charter-parties, and on contracts of affreightment, and libels by material men, both *in rem* and *in personam*, for repairs and supplies furnished in the home port, showing conclusively that the jurisdiction of those courts extended to all cases of admiralty and maritime jurisdiction, as understood for centuries in the parent country, until the power of the admiralty court was paralyzed by the prohibitions of the courts of common law.—Ins. Co. v. Dunham, 11 Id. 10.

Throughout many years of our judicial history it was a vexed question whether the district courts could exercise jurisdiction in cases founded upon marine policies of insurance, and all agree that the discovery of those volumes containing the proceedings of the colonial admiralty courts contributed very much to the true

solution of that question. Authentic proof is there exhibited that the colonial admiralty courts exercised jurisdiction in such cases, and the proof is equally full and undeniable that those courts also exercised jurisdiction *in rem* in favor of material men to enforce the payment of their claims for repairs and supplies furnished to domestic ships.

Creditors of the kind have suffered very severely for nearly twenty years, and it seems cruel to deny them all means of proceeding against the ship when every proctor knows that it is the only remedy they ever had which is of much value.

Suggestion is sometimes made that the court may restore the old twelfth rule and give the district courts authority in such cases to enforce the state law lien by a proceeding *in rem*. Such an expedient was tried for many years, and it seems to me that the experience of that trial, as given by the late Chief Justice Taney, ought to deter any well-wisher of the federal system from any attempt to re-establish a practice which so signally failed in the former trial.

Necessaries, whether for repairs or supplies, are usually ordered by the master, and the best text-writers say that his authority is sufficient to cover all such repairs and the supply of such provisions and other things as are necessary to the due employment of the ship, and that it extends even to the borrowing of money in the absence of the owner, if ready money is required for the purpose of the same employment. Maclachlan on Ship. 129; Belden v. Campbell, 6 Exch. 886; 1 Conkl. Adm. 73.

Frequent credit is indispensable in cases of emergency, and all experience shows that in many cases it can not be obtained unless the merchant, provision dealer, material-man, or ship-chandler is allowed a lien on the ship which may be enforced by a libel *in rem*, as the master and owner are often of too doubtful responsibility and too frequently become insolvent to enable the master to procure such necessaries without other security. State lien laws are too complicated and pregnant with too many conditions and special regulations in their machinery to be administered in a court of admiralty, even if it be competent for this court to provide for the exercise of such a jurisdiction by a district court sitting as a court of admiralty.

Authority to make rules, it is conceded, is vested in this court, and it may be that such a rule might not be productive of very serious embarrassment if the state lien laws were *permanent* laws and gave the lien *in general terms*, without specific conditions or limitations inconsistent with the rules and principles of the maritime lien. But the state lien laws, even in such a case, were enforced under the old twelfth rule, not as a right which the admiralty court was bound to carry into execution upon the application of the libellant. On the contrary, those who framed the rule always regarded it in the light of a lien established by a foreign country, which the admiralty court might, at its discretion, enforce under that rule in cases where it did not involve controversies beyond the limits of admiralty jurisdiction. The St. Lawrence, 1 Black. 520.

Process *in rem* was authorized by that rule upon the ground that the local laws gave the lien where none was given of a maritime character, and the court in that case proceeded to say that the practice was found to be inconvenient in most cases and absolutely impracticable in others, which induced the court to repeal the rule. Different expedients have since been tried, as appears from the various modifications to which that rule has been subjected, and now it is suggested that it may become advisable to return to the practice which the justices who framed that rule found it necessary to abondon "as entirely alien to the purposes for which the admiralty power was created, and decided that it formed no part of the code of laws which the admiralty was established to administer." Before doing so it may be wise to weigh the reasons given by the justices who framed that rule as to the grounds for its abandonment.

In many of the states, say the court, the laws were found not to harmonize with the principles and rules of the maritime code. Certain conditions and forms of proceeding were required to obtain the lien, and it was generally declared to be forfeited or regarded as waived after the lapse of a certain time, or upon some future contingency. These conditions and limitations differed in different states, and if the process is to be used wherever the local law gives the lien, it will subject the admiralty court to the necessity of examining and expounding the lien laws of every state, and of carrying the same into execution, and that, too, in controversies where the existence of the lien is denied and the right depends altogether on a disputed construction of a state statute, or, indeed, in some cases, of conflicting claims under the statutes of different states, as when the vessel formerly belonged to the port of another state where she also became subject to a state law lien. Cases also arise where a third party claims a lien prior and superior to that of the libellant under the provisions of a statute of another state, and where such a controversy arises, say the court, in such a proceeding *in rem*, the admiralty court clearly has no power to decide or to adjust the prior claims in dispute, and consequently would be compelled to abandon the contest and recall its process whenever the controversy assumed that shape.

Reasons such as those given by the court in that case, certainly deserve mature consideration, and it will be sufficient to refer to the lien laws of two or three of the states to show that the picture there portrayed is not overdrawn.

Work done or material furnished for or towards the building, repairing, fitting, furnishing, or equipping ships or vessels, constitute, by the law of the state of New Jersey, a lien upon the ship or vessel, her tackle, apparel or furniture, and the provision is that the lien shall continue for nine months after the debt is contracted, and that it shall be preferred to all other liens except mariners' wages. Sess. Acts, 1857, p. 382. Means are also provided in the same act to enforce such a lien, if the debt amounts to the sum of twenty dollars. Application in writing must be made by the creditor to one of the magistrates named in the act, for a warrant to enforce the lien and to collect the amount, but if the application is drawn in due form the officer or magistrate to whom the same is addressed is required to issue his warrant to the sheriff, or other proper officer, commanding him to attach, seize, and safely keep the ship or vessel, to be disposed of as directed in the same act. He must also make return of his doings in the premises within ten days, to the officer who issued the warrant, and make out, subscribe, and annex thereto, a just and true inventory of all the property so seized, to be signed by him and annexed to his return.

Important duties are also imposed upon the officer who issued the warrant. He must direct that a notice containing certain prescribed requisites shall be published in one or more of the newspapers printed in the county, in order that any other person having such a lien upon the ship or vessel may deliver to the said officer an account in writing of his demand, accompanied by the prescribed affidavits and proofs; and the act provides that every such person shall be deemed an attaching creditor, and shall be entitled to the same benefits and advantages and be subject to the same responsibilities and obligations as the creditor who made the first application; and the further provision is that liens not so presented and verified shall be deemed inoperative and cease.

Massachusetts has also passed laws to accomplish the same general purpose, which, in effect, give a lien on the ship to the material man, who, in that state, has furnished labor, or labor and materials, or provisions or stores, for or on account of such ship, to secure the payment of such debt, the lien to continue until the debt is satisfied, unless it be dissolved, as it may be if the creditor does not within four days from the time the ship departs from the port file in the clerk's office of the city or town a statement, subscribed and sworn to as prescribed, giving a just and true account of his demand with all just credits, and the other particulars therein required. Provision is also made for the enforcement of the lien

by petition to the superior court of the county where the vessel was when the debt was contracted, and the mode of proceeding prescribed is that the petition may be entered in court or filed in vacation, in the clerk's office, or may be inserted in a writ of original summons with an order of attachment, and be served, returned, and entered as other civil actions; and that the subsequent proceedings for enforcing the lien shall, except as therein further provided, be as prescribed in the act enforcing liens on buildings and land. Gen. Stats. Mass. 768.

Any number of persons having such liens upon the same ship may join in the same petition to enforce the same, and the same proceedings shall be had in regard to the respective rights of each petitioner, and the claim of all shall be marshalled to prevent a double lien for the same labor, materials, stores, or provisions, and to secure the just rights of all. Proper costs and expenses are to be deducted from the proceeds, and the residue is to be distributed among the several claimants, paying them in full or *pro rata* as circumstances may require.

Laws to the same end have been passed by the legislature of New York. Debts contracted within that state, to the amount of fifty dollars, by the master, owner, charterers, builder, or consignee of any sea-going or ocean-bound ship, on account of work done or materials or other articles furnished towards the building, repairing, fitting, furnishing, or equipping such a ship, are made a lien upon the ship, her tackle, apparel and furniture, in preference to all other liens except mariners' wages. Provisions and stores furnished, wharfage and the expense of keeping the ship in port, and services in loading and unloading the ship, and debts for towing or piloting, of the amount of twenty-five dollars, are also included in the same category and are entitled to the same lien.

Detailed means are also provided for enforcing the lien, whether the repairs and supplies are to ocean-bound ships or smaller vessels. Liens of the kind cease at the expiration of six months after the debt was contracted, unless the ship was absent from the port when the six months expired, in which case the provision is that the lien shall continue ten days after the ship shall next return to the port, subject, however, to the condition that the debt shall cease to be a lien whenever the ship shall leave the port, unless the creditor shall, within twelve days after her departure, cause to to be drawn up and filed specifications of such lien as therein provided, with a statement under oath of the amount claimed to be due, and file the same specification in the office of the clerk of the county or city, as therein more fully set forth.

Compliance with these requisites being shown, the creditor may apply to a justice of the supreme court, at chambers, in the proper county, for a warrant to enforce the lien, and to collect the amount. All the various steps required to be taken to enforce the lien and collect the debt are then prescribed, every one of which is "alien to the purposes for which the admiralty power was cre ated, and forms no part of the code of laws which it was established to administer." 4 Stat. at Large, N. Y. 653.

Separate examination of the different features of these several enactments will not be attempted, nor is it necessary, as it is manifest that any one at all acquainted with the practice in suits *in rem* will see at a glance that the admiralty courts as now organized are utterly incompetent to execute such conditions and regulations. Alterations, it is said, may be made in the organization of the district courts to obviate the difficulty, but the incompetency of those courts to administer such regulations under existing laws is by no means the only objection to such an experiment, as it may well be doubted whether this court, in view of the great number of such enactments, and the frequent changes to which the enactment of each state is annually exposed, will be able to perform all the duties which the adoption of such a system would impose, without leaving unperformed many of the high purposes contemplated by the constitution and the original judiciary act.

These several conclusions render it unnecessary to give much examination to the other objections urged by the appellees to the pretensions of the appellants, that they are entitled to the balance of the fund in the registry of the court by virtue of their mortgage, which has never been formally foreclosed. They are mortgagees, and inasmuch as their mortgage has never been foreclosed, and their claim is opposed by the owner of the steamer, I am of the opinion that the district court sitting as a court of admiralty had no jurisdiction of the case of action, and that the decree of the circuit court reversing the decree of the district court is correct. Schuchardt v. Ship Angelique, 19 How. 241; The John Jay, 17 Id. 401; The Neptune, 3 Hagg. 132; The Dowthorpe, 2 W. Rob. 3; The Sailor Prince, 1 Ben. 461.

Even suppose that difficulty may be obviated, which is denied, still the governing rule of decision remains, that the appellees as material men, have a superior lien by virtue of the maritime law. Clearly that would be so in any commercial country in the world, except England, unless our own country must be included in that catagory. Commentators everywhere agree that by the civil law and the law of those countries which have adopted its principles, a lien upon the ship is given without any express contract, to those who repair or furnish her with necessaries, either at home or abroad. Maude & Pollock on Ship. 67; 1 Valin. 363, 369; Ord. de la Mer, Title 2, Art. 1; Cleirac Jur. de la Mer, 351, Art. 6; Casaregis Dis. 18; 2 Brown Civ. & Adm. Law, 142; Roccus de Nav. et Nat. 82, 91–93.

Sufficient has been remarked to show that the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when the colonies emigrated here and formed themselves into new communities, and it may be admitted, that it does not extend to all cases which would fall within it, according to the civil law and the practice and usagess of continental Europe.

Our ancestors when they immigrated here organized themselves into colonies, and assumed and exercised all the powers of government. They enacted new laws, and those in operation were in many cases modified. Judicatories were created and empowered to hear and determine legal controversies, including all those of maritime character, wholly unrestricted by the prohibitions of the common law courts of the country from which they had emigrated, and when in the progress of events, they found it necessary and proper to frame the federal constitution, and saw fit to provide that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction," it was to the admiralty jurisdiction as it was known and understood in the states to which they referred.

Proofs of the highest character are now exhibited that the admiralty courts of the states did exercise jurisdiction over contracts for repairs and supplies furnished to domestic ships, as well as to foreign ships, and it follows, as it seems to me, that he appellees in this case had a maritime lien upon the steamer; and that the same attaches to the proceeds in the registry of the court; and that the decree of the circuit court should be affirmed.

JUDGMENT REVERSED.

Book Notices.

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Correspondence.

A SINGULAR CASE.

GALLATIN, MO., June 24, 1875.

EDITORS CENTRAL LAW JOURNAL:—It has just been decided by the supreme court of this state that the right to drink intoxicating liquors, and especially beer, is a valuable privilege, the surrender of which for eight months will be sufficient consideration to support a promise to pay at least fifty dollars. Lindell v. Rokes, decided at the present term, at St. Joseph, was an action by the payee against the maker of the following instrument:

"MARYVILLE, MO., JULY 1, 1872.

"$50.

"I promise to pay Charles Lindell fifty dollars ($50.00) March 1, 1873, if he, during the time from July 1, 1872, to March 1, 1873, will not drink intoxicating liquors and beer of any kind.

[Signed] N. ROKES."

The defendant pleaded want of mutuality in the contract, and that it was without consideration. Plaintiff proved compliance with the conditions of the contract upon his part, and recovered judgment for the amount of the note. The defendant appealed. The supreme court, Wagner, J., delivering the opinion, affirmed the judgment of the court below, holding that the contract was not wanting in mutuality, that it was not against public policy, and that it was founded upon a sufficient consideration. M. A. L.

Notes and Queries.

SOME POINTS UNDER A WILL—DEVISE OF REALTY IN VIRGINIA.

WARRENSBURG, MO., June 22nd, 1875.

EDITORS CENTRAL LAW JOURNAL—GENTLEMEN:—Will you be so kind as to give the following queries a place in your columns, and ask some of your Virginia correspondents to answer the same?

I. On the 11th day of Jan'y, 1799, the commonwealth of Virginia granted to one A. certain realty situated at that time in Virginia, but which is now in the state of West Virginia. A lived in Maryland; he made a will in Maryland, and died there, leaving as his sole heirs at law two daughters, B. and C. In his will he appointed D. as a trustee, to rent and sell, or to rent or sell certain lands in the then state of Virginia, granted as aforesaid to A. by the state of Virginia, the proceeds of such renting or sales to be equally divided between B. and C. He appointed an executor to dispose of the property that might remain, that was not given in the power to D. to dispose of.

II. Before D. carried out the provisions of the power in him vested by the will, he (D.) died, about 1840 or 1844.

III. Afterwards C., the youngest heir married E., and B. the eldest married F. B. and her husband F., removed from Virginia in the year 1841, leaving C. and her husband E., in possession of the land mentioned in the will as vested in D., for the purpose aforesaid. E., by his wife C., had six children. C. died in the year 1842 or 1843. E. then married a second time, about the year 1847. The land had never been by any act of the trustee, D changed from the character with which it was impressed by the testator when he appointed said trustee, up to the time of the second marriage of E., neither was there up to that time a successor to D. appointed.

IV. E., in 1848, conveyed by a warranty deed, all of said land to G. for value, without B's. knowledge or consent as to her portion of the same.

V. At that time of the conveyance by E. to G, B. the eldest heir of A., was living and had children living also. In the year 1849, B. died, leaving her husband F. and her children. In 1862, F. the husband of B. died, leaving several children of his by B. The youngest of said children, H., attained his majority in 1862.

I don't know whether the testator A. had a patent for the land or not, or whether he located it under a military land warrant. The latter, however, is my opinion, for he was a soldier before that time.

I. If A. located the land on a land warrant, was it necessary, in order to complete his title, that he should have a patent from the state of Virginia, or did the land warrant alone divest the state of its title? What was the law of Virginia governing such cases at that time?

II. What effect would the death of D., the trustee under the will, have on the realty, D. having died before executing the powers vested in him by said will?

After D's. death, there never was a successor to D. appointed. No would a successor to D. be appointed at this time, to carry out the provisions of the will in that behalf.

III. H. having attained his majority, 13 years after the death of B., his mother, to-wit, in the year 1862, when did H's. right of action accrue, and how long a time under the laws of West Virginia, where the land now is, has he in which to bring his action, after the disability of infancy is removed, if at all?

B.

FOREIGN JUDGMENTS.

A subscriber writes: "I have been perplexed by the following query. A., residing in Indiana, by a deed of general warranty, conveys to B. of the same state, land in Kentucky. B., learning A. had no title does not take possession, but brings suit in Indiana for breach of warranty. While this action is pending, B. brings suit in Kentucky against the *terre tenant* to recover the land, and gives A. notice of the suit, and to protect the title; to which A. pays no attention, and judgment is rendered against B. on the specific finding by the court, that the deed of A. conveyed no title, by reason of a valid outstanding tax title. Is this record available, and conclusive on the parties, at the trial of the case in Indiana? K.

PURCHASE AT EXECUTION SALE—AFTER-ACQUIRED PATENT.

We have not had time to look into the following query, although we have held it over for some time in hopes of being able to do so. The questions are no doubt *res judicata*, and possibly some light may be derived from the following cases: Levi v. Thompson, 1 Morris, 235; Jackson v. Williams, 10 Ohio, 69, and Land v. Hopkins, 7 Ala. 115. We hope to hear from some of our readers with reference to it.

VAN BUREN, ARK., June 1, 1875.

EDITORS CENTRAL LAW JOURNAL:—"A." purchased a tract of land from the school commissioner of his county, giving his note, with personal security, and taking bond for title. This was prior to the late war. The termination of the war found him in Texas, a non-resident of Arkansas. An attachment was issued against his lands, based upon indebtedness, other than the school note, and by order of sale the school lands were sold. His surety on the school note died, and the note was probated against, and paid by his estate. Subsequently "A." assigned his bond for title to the administrator of his surety's estate, for the benefit of said estate, and the administrator, upon presentation of paid note and assigned bond received a patent from the Governor, according to law.

1. Does the title acquired by this patent inure to the benefit of the purchaser under the execution or order of sale?

2. Does the purchaser at an execution sale take *only* such title as the execution debtor has at the *time* of such sale?

3. Can the purchaser, having *purchased* only an equitable title, and having taken no steps to perfect it, now hold the land against the holder of the patent?

Of course the assignee stands in no better attitude than his assignor; the assignment having been made with full knowledge, and for the purpose of saving the estate of the surety if it could be done.

Please cite authorities. G. W.

Recent Reports.

PENNSYLVANIA STATE REPORTS. VOL. 75. COMPRISING CASES ADJUDGED IN THE SUPREME COURT OF PENNSYLVANIA. By P. FRAZER SMITH, State Reporter. (Vol. 25). Containing cases argued at January Term, 1874. Philadelphia: Kay & Bro. 1875.

This volume is everything that could be desired in style and workmanship; indeed it could scarcely be less, coming from the house of Kay & Bro. The names of the judges of the Courts of Common Pleas, and other inferior courts are given in a table in the front part of the volume. The tables of cases are very full, and the index carefully prepared. The practice of entitling the cases in some instances by naming only the appellant, is confusing and awkward, and must prove inconvenient for purposes of citation and reference. Thus we have "Wood's Appeal," which arose from a bill filed by appellant against Quay and others, and which should have been entitled accordingly, to correspond with general usage and manifest convenience. There are

no less than twenty other cases similarly entitled. Fortunately the name of the other party is generally given in the table of cases; thus, "Fessler's Appeal," is inversely tabled as "May's Appeal." A more uniform and convenient style would vastly improve the appearance and enhance the value of the work.

Practice—Support of Paupers.—Danville and Mahoning Poor District v. Montour County, p. 35. Assumpsit will lie by one poor district against another, for maintenance of a pauper belonging to the latter district.

Arbitration and Award.—Shisler v. Keavy, p. 79. After an agreement for submission has been executed, neither party can revoke it. A submission in writing can not be revoked except by writing given to the referees, or a majority of them.

Street Railway—Negligence—Stopping for Passengers to Alight.—Crissey v. Hestonville, etc., Railway Co., p. 83. The question of negligence is for the jury, and no definite or inflexible rule as to what constitutes it can be laid down. It is the duty of a railway company to cause its cars to come to a full stop for passengers to get off.

Negotiable Paper—Discharge of Endorser.—Hagey v. Hill, p. 108. The holder of a note agreed in writing with the drawers, upon consideration to give them time, with the proviso, "that no delay of demand shall interfere with any claim" upon the endorsers. *Held*, that the endorsers were not discharged. Any act by the holder which prejudices the right of the endorser to his action against the drawer, will discharge him.

Husband and Wife—Relinquishment of Dower.—Burk's Appeal, p. 141. A. contracted to sell land. His wife refused to join in the deed, there being no collusion. *Held*, that the vendee could not compel specific performance by the husband alone and retain part of the purchase-money to cover the wife's contingent claim for dower.

Negotiable Paper—Mutilation of Note—Removing Condition.—Zimmerman v. Rote, p. 188. A note payable to order "for value received without interest, waiving the right of appeal, and of all valuation, appraisement, stay and exemption laws," had written on its margin, before signing, a condition reciting that it was given for a patent, and was not to be paid until a certain profit had been made thereon. This condition was afterwards cut off, and the note negotiated. *Held*, that the note was negotiable, and that the existence of the condition and failure of consideration were no defence to the note in the hands of a subsequent holder without notice.

"Lawful Money"—Payment.—Eagle Beneficial Society's Appeal, p. 226. Land was purchased subject to a mortgage which recited that the mortgagor was bound by a bond of even date to the mortgagee, in the sum of $3,000, lawful money of the United States, conditioned for the payment of $1500 of like lawful money, "as in and by the said recited obligation, etc., will appear." The bond was in "$3,000 lawful *silver* money of the United States," conditioned for the payment of $1500, "if like lawful money." *Held*, that payment in lawful money of the United States, of any description, was good.

Sale of Personal Property—Warranty.—Whitaker v. Eastwick, p. 229. A purchaser takes the risk of the quality of the article sold unless there be fraud or warranty. There is an implied warranty of title, but not of quality. Mere representation is not warranty. The relation of buyer and seller is not confidential. The plaintiffs purchased a cargo of coal, by the bill of lading and the representations of the defendants that it was "good coal, well adapted for generating steam." *Held*, that evidence that the coal was full of dirt, and that it took an increased quantity to accomplish the purpose, was inadmissible.

Sale of Personal Property—Insolvency of Purchaser—Knowledge of Insolvency.—Rodman v. Thalheimer, p. 232. Insolvency of a vendee of goods, and his knowledge of it, are not alone such fraud as will set aside a sale and enable the vendor to rescind and replevy the goods from the actual possession of the vendee; but such insolvency and knowledge are evidence for the jury, with other facts of intended fraud.

Express Company—Liability for Contents of Trunk sold for Charges.—Adams Express Co. v. Schlessinger, p. 246. A number of trunks were sold for charges, under an order of court, by the Adams Express Company, among them, that of the defendant in error, which was sold locked, and without exposing its contents. *Held*, that the order of court did not protect the company. Evidence that the owner of the trunk was a lady of wealth, and the goods described by her as contained in the trunk, were worth $20,000, and were such as are possessed by persons in similar circumstances, was held admissible. See 1 CENT. L. J. 360.

Ante Nuptial—Reconveyance to Widow after Death of Husband.—Russell's Appeal, p. 269. In contemplation of marriage, and with the consent of her intended husband, a woman executed a deed of settlement of all her estate to trustees to pay her the income during her life, and after her death to convey the estate to her children according to testamentory appointment, etc. There was no power of revocation, and the wife always believed that if she survived her husband, she could dispose of the estate as she pleased. The wife survived her husband, who died leaving no issue. In a suit by the wife against the residuary beneficiaries under the settlement for a reconveyance, by the trustee, to her of the estate: *Held*, that the absence of the power of revocation being a mistake, and the beneficiaries, in absence of issue of the marriage, being volunteers, and there being no consideration for the settlement on them, the widow was entitled to a reconveyance.

——. Tucker's Appeal, p. 354. Where the husband and wife had conveyed her property in trust, to be free from the liabilities of her present and any future husband, and after her death for such persons and uses as she might appoint, etc., the husband having died first: *Held*, that the widow was entitled to a reconveyance from the trustee.

Equitable Assignment of Fund.—Jermyn v. Moffitt, p. 399. Where an order is drawn for *the whole* of a fund, it is an equitable assignment of it, and binds the fund in the hands of the drawee after notice. An order drawn for *part* of a fund, is not an assignment unless the drawer accepts, or an acceptance, or obligation to accept may be implied from custom. An assignment professing to transfer a debt for wages not yet earned, against any person who may thereafter employ the assignor, although there may be notice of the assignment to the employer, is insufficient without his acceptance.

Foreign Attachment.—Coleman's Appeal, p. 441. Without a voluntary submission by a defendant in foreign attachment to the jurisdiction of the court, judgment in the case can be enforced only against the property attached. Such judgment has no extra-territorial operation. Foreign attachments will not lie upon a demand for tort.

Trade Mark.—Glendon Iron Co. v. Uhler, p. 467. Plaintiffs adopted the trade-mark "Glendon" on their iron; the place where their furnaces were, was afterwards made a borough by the name of Glendon. Another company afterwards used the same mark. *Held*, that there was nothing to prevent the second company from so doing. As a rule, the name of a town, etc., can not be exclusively appropriated as a trade-mark. A lawful act is not actionable, though it proceed from malicious motive. C. A. C.

Abstracts of Opinions of the Supreme Court of the United States.

[Prepared expressly for this journal, by HENRY A. CHANEY, Esq., of Detroit, Mich.]

Mercantile Law—Negotiable Promissory Notes—Indorsement and Suretyship—Construction of Statutes which alter the Common Law—Suspension of Commercial Intercourse by War, and of Statutes of Limitations by the Rebellion.—Ross, Adm'r, v. Jones *et al.* Opinion by Clifford, J. 1. Mercantile law is a system of jurisprudence recognized by all commercial nations, and demands, as far as practicable, uniformity of decision throughout the world. Goodman v. Simonds, 20 How. 364. 2. Negotiable promissory notes, like bills of exchange, are commercial paper in the strictest sense, and as such, are favored instruments, as well on account of their negotiable quality as for their universal convenience in mercantile transactions. Hence the law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men, and any course of judicial decision calculated to restrain or impede their unembarassed circulation would be contrary to the soundest principles of public policy. 3. The maker of a note is, in general, the principal debtor, and all the other parties are in a special sense, sureties for him; if indorsers, they are liable only in case of his default, unless they have waived demand and notice. Though all the other parties are sureties in respect to the maker, still they are not co-sureties, but each prior party is a principal in respect to each subsequent party. 4. The holder of a dishonored note has his choice to sue any one of the parties to the note who is in default, or all of them, and is not bound, even at the indorser's request, to use diligence in seeking his re-imbursement, and if the indorser desires to secure the amount, his remedy is to pay the note himself and then bring suit against the maker or any other party liable over to him. Story on Notes, 5th ed, § 115, a; Ib. § 419; Beebe v. Bank, 7 Watts & Serj. 375. Having this right and the right of being subrogated to all the holder's rights as against the maker, an endorser whose liability is fixed by due notice of the maker's default, is not entitled to the aid of a court of equity as a surety. Lenox v. Prout, 3 Wheat. 525; Trimble v. Thorne, 16 John. 153; Warner v. Beardsley, 8 Wend. 199; also 6 Wend. 610; Frye v. Barker, 4 Pick. 382; Hunt v. Bribham, 2 Pick. 581. 5. An indorser of a promissory note, though in the nature of a surety, is not for all purposes entitled to the privileges of that character, as he is answerable upon

an independent contract, and it is his duty to take up the note when it is dishonored. Ellsworth v. Brewer, 11 Pick. 320. He does not lose his character of indorser, nor can he be made liable on the note without proof of due demand and notice (Bradford v. Conrey, 5 Barb. 462), which proof, if the demand and notice are seasonable and in due form, removes every condition from his liability except that the holder will do no act to suspend, impair or destroy his right to indemnity from such other parties to the instrument as are bound to save him harmless. Woodman v. Eastman, 10 N. H. 350; Warner v. Beardsley, 8 Wend. 2nd ed. 195, and note. 6. Statutes passed in derogation of the common law should be construed strictly, especially where it is attemped to change the rules of commercial law applicable to bills of exchange and promissory notes. Statutory remedies, where the right to be enforced was unknown at the common law, are to be strictly followed, both as to the methods to be pursued, and the cases to which they are to be applied Lease v. Vance, 20 Iowa, 509. The meaning of statutes that alter the common law shall not be strained beyond the meaning of the words, except in cases of public utility, *e. g.*, when the end in view seems more comprehensive than the enacting words. Potter's Dwarris, 186. Where the expression is in general terms, statutes are to be construed as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law beyond what they express. 9 Bouvier's Bac. Abt. 245; Sedgw. on Stats. 2nd ed. 267; 1 Kent. Com. 12th ed. 464; Broom's Max. 4th ed. 552; Smith's Com. 676. 7. A statute providing that a surety in any bond, bill or note, may give the holder notice to sue the principal in writing; and that if the holder fails to do so, the surety shall be discharged [Gould (Ark.) Dig. Stats. 1015], is in derogation of the common law, even if restricted to sureties in the general sense, but would be more so, if it could be extended to include endorsers upon bills of exchange, and negotiable promissory notes. It contemplates that the cause of action will accrue against the principal and surety at the same time, which is never the case with the endorser and maker. Such a notice may certainly be given by a surety proper, whether his contract is expressed by a bill, bond or note, as soon as the instrument falls due, but it would be unreasonable to suppose that an endorser would give such a notice before his liability had become fixed, as it may be that such a demand to sue would operate as a waiver of the right to notice of the dishonor of the note "Persons bound as security for another," are the words of the statute, which undoubtedly includes sureties proper in a bond. bill or note, but they cannot reasonably include an endorser whose liability is fixed by the required notice of the dishonor of the bill or note. Sureties in a note who became joint promissors with the maker, stand in the same relation to the principal as in a bond given for the payment of money on the delivery of property. Authority to give the notice provided in the statute, arises immediately after the bond, bill, or note falls due, which evidently refers to the lapse of time specified in the contract, but the absolute obligation to pay, does not arise in the case of an endorser before notice of dishonor, which can never be given to the endorser till after the note is presented to the maker, and he has refused or neglected to fulfill his promise to pay, so that the notice in writing, requiring the holder to sue the endorser with the maker, seems to be inapplicable before the endorser's liability is fixed by the demand of payment of the maker, and his refusal to comply, and notice given to the endorser of the dishonor of the note. 8. If any act of the holder of a negotiable promissory note suspends, impairs or destroys the right of the prior parties to indemnity from those otherwise liable over to them, he can not resort to the parties affected by his conduct to make good the default of the maker of the instrument. Bank v. Hatch, 6 Pet. 258; McLemore v. Powell, 12 Wheat. 556; Wood v Bank, 9 Cow. 194; Bank v. Harrick, 2 Story, 416; Newcomb v. Rayner, 21 Wend. 108; Byles on Bills 11th Ed., 247, n. 1; 3 Story on Notes, 5th Ed., § 413. Mere delay to enforce payment, without a binding contract to give time, will not have that effect even in the case of a surety. Philpot v. Blunt, 4 Bing. 721; Story, Prom. Notes, 5th Ed., § 415. 9. The contract of the endorser differs from that of the surety who is a joint promissor with the principal; the holder of an endorsed note is under no obligation to use diligence to enforce payment against the maker in order to hold the indorser. Bank v. Myers, 1 Bailey, 418; Powell v. Waters, 17 John. 179; Stafford v. Yates, 18 John., 329, Bank v. Rollins, 13 Me. 205; Page v. Webster, 15 Me. 256; Bank v. Ives, 17 Wend. 502; Sterling v. M. & C. Co., 11 S. & R. 182; Kennard v. Knott, 4 Man. & Gran., 474. Even where the holder of a promissory note already fallen due, was called on by the endorser to prosecute the maker, of whom the amount might then have been collected, but who afterwards become insolvent, and the holder neglected to do as requested, such neglect did not discharge the endorser. Trimble v. Thorne, 16 John., 159; Beebe v. Bank, 7 Watts & Serj. 375. It seems that the endorser is not to be regarded as a surety after his liability is fixed by due presentment, demand and notice of the dishonor of the note, and that when his liability is fixed by those acts of the holder, he becomes a principal debtor himself, subject only to the condition that the holder shall do no act to suspend, impair or destroy his remedy over against prior parties to whom he has a right to resort for a remedy. McLemore v. Powell, 12 Wheat. 556; 2 Pars. Notes and Bills, 243-5; 3 Kent's Com., 12th Ed., 105. The endorser is not a surety in the general sense, as he stands in the attitude of the drawer of a new bill, and is not primarily liable to make the payment, but only in case of the default of the maker and proof of due presentment, protest and notice of dishonor, and even then he can not be joined with the maker as the surety proper may be, because the maker and endorser are liable on different contracts. 2 Pars. Bills and Notes, 25. 10. The endorser of a note contracts with the endorsee and every subsequent holder to whom the note is transferred, as follows: (a.) That the instrument and antecedent signatures are genuine; (b.) that he, the endorser, has a good title to the instrument; (c.) that he is competent to bind himself in such a contract; (d.) that the maker is competent to bind himself to the payment, and that he will, upon due presentment of the note, pay it at maturity; (e.) that if, when duly presented, it is not paid by the maker, he, the endorser, will, upon due and reasonable notice being given him of the dishonor, pay the same to the endorsee or other holder. Story on Notes, 5th Ed., § 135; Story on Bills, § 108; 2 Pars. Bills and Notes, p. 23; Ogden v. Saunders, 12 Wheat. 341; 3 Kent's Com., 12th Ed., 88; Bateman, Commer. Law, § 319. 11. War, when duly declared or recognized by the war-making power, peremptorily suspends all commercial intercourse or correspondence with persons domiciled in the enemy's country, and the enforcement of remedies for unfulfilled commercial obligations. Peace restores the rights and remedies. Hanger v. Abbott, 6 Wall. 539. 12. For the suspension of statutes of limitations, the war of the rebellion must be held to have lasted from the proclamation of the blockade, April 27, 1861, to the proclamation that the war was closed, April 2, 1866. Brown v Hiatts, 15 Wall. 177. See Batesville Inst. v. Kauffman, 18 Wall. 155.

Summary of Our Legal Exchanges.

ADVANCE SHEETS OF 55 N. H. REPORTS *

Mortgage of Leaseholds—Fixtures—Bills of Sale Act—17 and 18 18 Vict. c. 36, s. 7.—Meux v. Jacobs, House of Lords. Opinion by Chelmsford, Hatherly and Selborne. [23 W. R. 526.] The rule "*quicquid plantatur solo, solo cedit*" applies to premises which are leasehold as well as to freeholds, and, therefore, under an equitable mortgage of leaseholds by deposits of title deeds, trade fixtures, whether affixed before or after the date of the deposit, pass to the mortgagee, without being expressly included in the security.

The Bills of Sale Act by its interpretation clauses, extends the term "personal chattels" to fixtures for the protection of certain classes of creditors, but does not alter the general law as to fixtures so as to make fixtures personal chattels for all purposes.

Copyright in a Name — Agency — Injunction. — Ward v. Beeton, Vice Chancellor Malin's Court. [23 W. R. 533.] The plaintiffs purchased the copyright of the defendant Beeton's publication, called "Beeton's Christmas Annual," and the defendant agreed, in consideration of a salary, to permit the plaintiffs to use his name, and bound himself to give his services to them, and not to engage in other business or enterprise. *Held*, that defendant must be restrained from allowing his name to be advertised in connection with a rival publication.

Covenant for Construction of Station—Trains to stop there for Passengers and Luggage—Railway Leased to another Company—Specific Performance—Parties—Injunction.—Churchill v. Salisbury and Dorset Railway Company. Vice Chancellor Bacon's Court. [23 W. R. 534.] The S. Railway Company purchased lands from C., and agreed to erect a station at A., and that the trains should stop there for passengers and luggage. They entered into possession of the lands but did not erect a station, and C. served a writ of ejectment on them. The S. Company then filed their bill praying for the specific performance of the contract. A decree was made ordering specific performance, and that C. should execute a proper conveyance of the lands, and that such conveyance should contain a covenant by the S. Company to erect the station, and that trains should stop there for passengers and luggage. This conveyance was duly executed. Under acts of Parliament of 1867 and 1873 confirming agreements between the S. Company and the L. S. W. Company, the latter company were empowered to take a lease for 1,000 years of the S. Railway, and to work it, and were, during such lease, to be liable to all duties and obligations to which the S. Company, if the acts had not been passed, would be subject and liable. No station was erected. *Held*, on a bill filed by C. against both companies, that C. was entitled to a decree against the S. Company for the erection of a station within three months, and to an injunction

against both companies restraining them from allowing the line to remain without a station for the reception, etc., of passengers and luggage according to the terms of the covenant. The injunction to be suspended for three months.

Mutual Insurance Contracts—Collection of Premium Notes.—Nashua Fire Ins. Co. v. Moore. [55 N. H. 48.] Opinion by Smith, J.—The charter of a mutual fire insurance company provided that every person becoming insured therein should pay, upon the execution of his policy, the premium thereon, and in addition thereto deposit his written agreement to hold himself liable for an equal amount in the capital stock of the company, to be assessed and collected by the directors in such sums, and at such times as they should deem expedient; that all premiums and deposits thus made should be considered the absolute funds of the company, and be applied, first, to the payment of the expenses of the company; secondly, of money borrowed; and, thirdly, of losses and notes given in payment of losses;—and in case losses should happen so as to consume the absolute funds of the company, each member should be held to pay, at the discretion of the directors, during the term of his policy, a sum not exceeding two dollars for each dollar of premium and deposit. On a bill filed by C. against both oompanies: *Held*, that such a deposit note was subject to collection at any time, at the discretion of the directors, for the purpose of discharging expenses, debts and losses of the company; that it was not necessary to enforce payment of such notes by a general assessment; and that such note might be collected to pay losses and expenses which accrued before the maker became a member of the corporation.

*Courtesy of John M. Shirley, Esq., Andover, N. H., Reporter.

ADVANCE SHEETS OF 66 ILLINOIS REPORTS.*

Descent—Illegitimate Child may take as next of Kin to his Mother.—Miller v. Williams, [66 Ill. 91.] 1. Under the statutes of this state, an illegitimate person is recognized as the child of his mother, as regards the descent of property, and made capable of inheriting her property to the exclusion of all other persons, where she was unmarried, and he is enabled to transmit by descent his own property to her and her children. 2. Where an illegitimate person died seized of real estate, and his mother had died before him, leaving another illegitimate son, she never having been married, it was held that the surviving illegitimate son took the property by descent, one-half from his deceased brother, and, as the next of kin to the mother, the half that would have descended to her had she been living.

Judicial Sales of Land—When may be made En Masse.—Van Valkenburg v. Trustees of Schools, etc., opinion by Scott, J. [66 Ill. 103.] When an officer charged with the sale of land under a decree of court, offers the premises in separate parcels and receives no bids, it is not error then to proceed to sell the same *en masse*. [Acc. Phelps v. Conover, 25 Ill. 309.]

*Courtesy of Hon. Norman L. Freeman, of Springfield, Ill., Reporter.

Legal News and Notes.

—HON. NORMAN L. FREEMAN has been re-elected by the Judges of the Supreme Court of Illinois, reporter of that court, for the period of six years.

—THE CHEAPEST YET.—The Daily Register says that the fifty-seventh volume of New York Court of Appeals reports has been issued by Banks & Brothers, the official publishers of these reports. The price is reduced to one dollar and ten cents per bound volume, which is uniform in size with previus volumes.

—OUR friends of the CENTRAL LAW JOURNAL have been sued for libel by the publishing house of James Cockcroft & Co., on account of a criticism that recently appeared in their columns, on "The History of Lawyers, Ancient and Modern," published by that firm. They have our sympathy.—[*The Legal Gazette.*

—THE members of the legal profession in Connecticut have formed a bar association, with the following officers: President, Origen S. Seymour, of Litchfield; vice-presidents, Charles R. Ingersoll, of New Haven; Richard D. Hubbard, of Hartford; treasurer, William Hamersley, of Hartford; secretary, John R. Buck, of Hartford; executive committee, John T. Wait, of Norwich, John S. Beach, of New Haven, Roger Averill, of Danbury, Henry Robinson, of Hartford, William T. Elmer, of Middletown.

THE CENTRAL LAW JOURNAL has the good fortune of a libel suit. Having recently commented in pointed but just terms on the attempt of "James Cockcroft & Co." to palm off an edition of Sir William Forsyth's "Hortensius," under an other, and to borrow the popularity of Samuel Warren, to help along an edition of Stephen's "Adventures of an Attorney in Search of Practice," the aforesaid "Cockcroft & Co.," have become virtuously indignant, and (perhaps, too, with an eye to advertising their wares), have commenced an action against Soule, Thomas & Wentworth, after first having submitted to their attorney "conclusive evidence of the falsity" of the criticism of the CENTRAL LAW JOURNAL. We are at a loss to know what species of evidence it can be that so satisfies the attorney, or why the corporation of "Cockcroft & Co." (for a corporation it appears to be) should go so far from home to vindicate its injured innocence, when it could attempt to do it so much better nearer home.—[*The Albany Law Journal.*

—VIGOROUS efforts are being made by the English bar to foster the law as a monopoly. A bill has been framed by the parliamentary commitee of the Legal Practitioners Society, and introduced in the House of Commons, imposing a penalty of ten pounds, with full costs of suit, upon "any person who, not being a qualified practitioner, either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument under seal, or who shall receive any fee, gain, or reward for drawing or preparing any such instrument." It is explained that "in any action against a person accused of violating the law in this matter, it will be necessary to prove only that he 'has received a fee, gain, or reward for the business or transaction in respect of, or in regard to which he has, directly or indirectly, drawn or prepared such instrument.'" It is claimed by the Law Times, and by those who advocate this bill, that it is not meant for the protection of the legal profession, but of the public, and that it will operate to reduce litigation, and hence professional emoluments. This claim is really too thin, and we are surprised that a sensible journal should urge it. Lawyers are but men; and when did any set of men ever become so deeply imbued with a spirit of disinterested philanthropy as to propose a measure that would deplete their own pockets, for the sake of benefiting an indifferent public?

—THE Saint Louis Republican, referring to our libel suit says:

"When it came to be law that a writ in a civil action issued by a New York city court, could claim and have effect on the person of a defendant a thousand miles beyond the jurisdiction of the court, we are at a loss to conjecture. A "Philadelphia lawyer" was ever supposed to know everything worth knowing, and of late years a New York lawyer has become more wonderful in wisdom than his Philadelphia brother; but the lawyers of both cities together would have some difficulty in demonstrating the marvellous virtue here claimed for the New York court's writ. Why the New York court presumed to issue it when it shows on its face that it was intended to opperate upon the persons of defendants beyond its jurisdiction, is a little curious. Does not the Supreme Court of New York city know where its jurisdiction ends? As the mountain will not go to Mahomet, we suggest that Mahomet come to the mountain; in other words, let the New York City Court hold an occasional term in Missouri for the trial of Saint Louis offenders."

The Republican is mistaken. The court is a very respectable court, and does not want to extend its jurisdiction unduly, but the plaintiff's lawyer wants it to. No judge or clerk has yet awarded any process against us; but under the peculiar practice in that state *lawyers* issue writs of summons, and cases are prepared for trial outside the court. That's how it is.

—OUR old friend the Forum, with whom we last year had a controversy about appropriating matter from this journal without giving due credit, is now at loggerheads with the Albany Law Journal. Our Albany neighbor criticised the Forum rather severely, but we feel obliged to say we think not unjustly, and the editor of the Forum was so indiscreet as to object thereto n an anonymous letter, upon which the Journal made some further disparaging remarks. And now the editor of the Forum publishes a card in the New York Daily Register, in his own vindication, which we think he had better not done. In the course of this card the editor of the Forum refers to a book called "*De Laudicus*," and also to "*St. German's* Doctor and Student," and then, "with just enough of learning to misquote," ends by enquiring, "Will the dull ass mend his pace by beatng?" and signs the card "Shakspeare." We are afraid the dull ass will not mend his pace by beating. We have done all we could to induce him to do so, but to no purpose. When a man's intellect is so upset that he thinks he is Shakspeare, he must be put aside as incorrigible. We would advise him to quit journalism and go to fighting grasshoppers in Minnesota, if we thought it would be of any use; but we know it will not. When the New Zealander, seated upon the pinnacle of Dr. McLean's new building in Saint Louis, shall behold the ruins of the great bridge protruding from a marsh, while the Mississippi, shrivelled to a little stream, creaps along the American bluff, and the coyote chases the jackass rabbit over the ruins of the new custom house, the Forum will still be published, albeit in a dead language and a month behind time (for the purpose of geting in the latest cases), and without any visible improvement.